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Supreme Court of the United States

OCTOBER TERM, 1935

No. 745

PREMIER-PABST SALES COMPANY, a corporation of the State of Delaware,

Complainant,

vs.

WALTER T. GROSSCUP, W. MORRELL WAGNER and LEO A. CROSSEN, constituting the PENNSYLVANIA LIQUOR CONTROL BOARD; CHARLES F. KELLEY, District Attorney of Philadelphia County, Pennsylvania; WILL B. HADLEY, County Treasurer of Philadelphia County, Pennsylvania; CHARLES J. MARGIOTTI, Attorney General of the Commonwealth of Pennsylvania; and GEORGE H. EARLE, 3d, Governor of the Commonwealth of Pennsylvania,

Defendants.

BRIEF OF APPELLANT

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SUBJECT INDEX

PAGE

Reference to Opinion of Lower Court 2

Jurisdiction 2

Statement of the Case 3

Statement of Facts 4

Specifications of Assigned Errors 8

Summary of the Argument 25

Argument 30

I. A state may not discriminate against liquors produced outside of State against persons selling them, under guise of exercising its police powers 30

A. Before the Wilson Act 32
B. Under the Wilson Act 33
C. Under the Webb-Kenyon Act 36
D. Under the 21st Amendment 50

II. Appellant, having rights affected, may properly question constitutionality of statute 53

III. Pennsylvania Act adopting arbitrary qualifications for licenses, deny to appellant the guaranties of XIV Amendment 59

IV. Views of Trial Court 66

Conclusion 67

Appendix

1. Portions of Beverage License Law 69
2. Regulation No. 51 93
3. Wilson Act 95
4. Webb-Kenyon Act 95
5. XXI Amendment 96
6. Pacific Fruit & Produce vs. Martin 97

ALPHABETICAL LIST OF CASES

PAGE

Adair v. *United States*, 208 US 161 61
Adams Express Co. v. *Kentucky*, 238 US 190 ..... 27, 38

Baldwin v. *Seelig*, 294 US 511 ..... 25, 28, 48, 67
Bethlehem Motors v. *Flynt*, 256 US 421 ..... 28, 47, 48
Bowman v. *C. & N. W. Ry.*, 125 US 465 ..... 26, 32
Brennan v. *So. Express Co.*, 106 SE 102 ..... 27, 37
Brown v. *Maryland*, 25 US 419 25

James Clark Distil. Co. v. *Western Md. Ry.*, 242 US 311 ... 27
Commonwealth v. *Petranich*, 183 Mass. 217 ..... 26, 36

Darnell v. *Memphis*, 208 US 113 ..... 28, 47
Evansville Brewery v. *Excise Com.*, 225 Fed. 204 27

Guy v. *Baltimore*, 100 US 434 25

Hill v. *Wallace*, 259 US 44 ..... 30, 58

Kentucky Finance v. *Paramount*, 262 US 544 ..... 29, 61

Leisey v. *Hardin*, 135 US 100 ..... 26, 32
License Cases, 5 Howard 504 ..... 26, 32
Liggett v. *Baldrige*, 278 US 105 ..... 30, 64

Mpls. Brew. Co. v. *McGillivray*, 104 Fed. 258 ..... 26, 36
Mugler v. *Kansas*, 123 US 623 61
Nofire vs. *United States*, 164 US 657 55

Pacific Fruit & Produce v. *Martin* 27
Power Mfg. Co. v. *Saunders*, 274 US 490 29

Quaker City Cab Co. v. *Pennsylvania*, 277 US 389 .... 29, 61

Railroad Retirement Bd. v. *Alton Ry.*, 295 US 330 .... 30, 57
Rhodes v. *Iowa*, 170 US 412 26

Scott v. *Donald*, 165 US 58 ..... 26, 33, 34, 40
Sonneborn v. *Keeling*, 262 US 506 25
State v. *Zophy*, 14 SD 119, 84 NW 391 ..... 26, 36

Triner v. Arundel, 11 Fed. Sup. 145 27
Tiernan v. *Rinker*, 102 US 123 ..... 26, 41, 42, 47
United States vs. *Chemical Foundation*, 272 US 1 55
United States v. *Royer*, 268 US 394 55
Vance v. *Vandercook*, 170 US 438 ..... 26, 33, 35, 40
Walling v. *Michigan*, 116 US 446 ..... 26, 44, 47
Webber v. *Va.*, 103 US 344 25
Welton v. *Mo.*, 91 US 275 25
Wilkerson v. *Rahrer*, 140 US 545 ..... 26, 32
Woodruff v. *Parham*, 75 US 123 25
Young's Market v. *State Board*, 12 Fed. Sup. 140 27

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Defendants.

BRIEF OF APPELLANT

REFERENCE TO THE OFFICIAL REPORT OF THE OPINION OF THE LOWER COURT

The opinion of the lower court in this case is reported in 12 Federal Supplement 970, February 17, 1936, Advance sheet.

JURISDICTION

A statement as to jurisdiction has been filed wherein definite reference to the statutory provision under which jurisdiction is invoked and to cases believed to sustain such jurisdiction is made, the same being separately printed pursuant to Rule 12 of this Court, (par. 1), and probable jurisdiction has heretofore been noted by this Court.

STATEMENT OF THE CASE

This is an appeal from a final decree, entered in the United States District Court for the Eastern District of Pennsylvania by a three-judge court convoked under §266 of the Judicial Code (tit. 28, §380, USCA), dismissing Complainant's Bill and denying the injunction therein prayed to restrain the officers of the State of Pennsylvania (appellees herein) from enforcing against appellant, a wholesale beer distributor within the State of Pennsylvania, those provisions of the Pennsylvania Beverage License Law imposing upon Appellant, and the malt and brewed beverages sold and distributed by it, discriminatory burdens and license fees solely by reason of their origin outside the State of Pennsylvania, and from enforcing against appellant those provisions of said Act which impose unreasonable and arbitrary requirements for the issuance of a license.

The undenied allegations of the Bill of Complaint and the Stipulation of Facts filed by the parties to the cause support the following:

Statement Of Facts

Appellant is a corporation organized and existing under the laws of the State of Delaware, duly registered as a foreign corporation under the laws of the State of Pennsylvania, and engaged in said state, as well as in numerous other states, in the business of soliciting orders for the sale, at wholesale, of Pabst beer and malt beverages manufactured in the States of Wisconsin and Illinois by the Premier-Pabst Corporation, from whom such beer is purchased by appellant. In fulfillment of orders taken by appellant from licensed distributors in the State of Pennsylvania, the beer is shipped from the breweries of the Premier-Pabst Corporation at Milwaukee, Wisconsin, or Peoria, Illinois, f. o. b. railroad cars in interstate traffic, and delivered to such purchasers at their respective places of business in Pennsylvania. (Stipulation of facts, par. 4 and 6, R. 87).

At the time of the passage of the Act in question and at the time of the commencement of this action, appellant maintained an office and place of business at Philadelphia and was the holder of a "Liquor Distributor's License," issued by the State of Pennsylvania under the "Malt Liquor License Law of 1933," by which license appellant was authorized "to engage in the business, inter alia, of importing malt and brewed beverages manufactured outside the State of Pennsylvania and distributing such beverages within the state." (Stipulation of Facts, par. 9, R 88). Appellant has expended approx-

imately $400,000 since April 7, 1933, in advertising, sales promotion, and other incidental expenses for the establishment of its trade, custom, and good will in the sale of Pabst beer in the State of Pennsylvania, and by reason thereof enjoys a large demand for its Pabst Beer within said state, selling in the year 1934 in excess of 50,000 barrels of such beer to its customers in said state. (Stipulation of Facts, par. 7, 8, R. 87, 88).

By the provisions of Section 32 (b) Sub-sec (a) of the Act of July 18, 1935, all licenses (such as the one held by appellant) issued to distributors prior to the effective date of said Act, were to remain in force for such period of a whole license year as the amount of the license fee paid bears to the amount of the license fee payable for a distributor's license under the Act of July 18, 1935, the rights of appellant, as the holder of a "Distributor's License" issued under the prior law, being identical with the rights of a holder of a "Distributor's License" under the Act of July 18, 1935. However, a distributor engaged under his Distributor's license issued pursuant to the provisions of the previous law, in purchasing beer from a manufacturer outside the State of Pennsylvania was, by the Act of July 18, 1935, and Regulation No. 51 promulgated by the Pennsylvania Liquor Control Board July 25, 1935, pursuant to the provisions of said Act, denied the right to continue such business unless he obtained an additional license, denominated by the act an "Importing Distributor's License," for which additional fees were required by the Act to be paid. (Stipulation of Facts, par. 10, R. 88; and Rule 51, Appendix —). The authority conferred upon the holder of a "Distributor's License" was expressly limited by Section 2 (d) and Section 5 (b) of the Act of 1935 to

"engage in the purchase only from Pennsylvania manufacturers and from importing distributors * * *"

The Act of July 18, 1935, thus purports to establish two classes of distributor's licenses (a) a Distributor's license authorizing purchase only from a manufacturer within the state or from the holder of an Importing Distributor's license, and (b) an Importing Distributor's license authorizing purchase from a manufacturer outside the state. It requires of the former an annual license fee of $400 and a bond of $1000, and of the latter an anuual license fee of $900 and a bond of $2000, and makes, as its sole criteria for determining whether the license required of one shall be a Distributor's License or an Importing Distributor's license, the source or origin of the product in which such person deals as coming from within or without the State of Pennsylvania. (§2 (d) and (e); §5 (b); §19 (b) and (c); §18, Act July 18, 1935, R. 42-76). The only distinction between the two classes of licenses is that indicated by the names themselves.

The present officers and directors of appellant corporation are all citizens and residents of the United States but are not residents of the State of Pennsylvania, nor are any of the present stockholders of appellant corporation residents of the State of Pennsylvania. (Stipulation of Facts, par. 4, 5, R. 87).

By Sec. 5, Sub-sec. (b) it is provided:

"Such licenses shall be issued to corporations duly organized or registered under the laws of the Commonwealth of Pennsylvania, only when it appears that all the officers and directors of the coorporation are citizens of the United States, and have been

residents of the Commonwealth of Pennsylvania for a period of at least two years prior to the date of application, and that at least fifty-one percent of the capital stock of such corporation is actually owned by individuals who are citizens of the United States and have been residents of the Commonwealth of Pennsylvania for a period of at least two years prior to the date of application."

The Bill of Complaint, filed by Complainant on behalf of itself and all other persons and corporations similarly situated, praying an interlocutory injunction and a permanent injunction upon final hearing, was filed in the United States District Court for the Eastern District of Pennsylvania, (R. 4), and on August 9, 1935, a Judge of that Court entered an order convoking a three-judge Federal Court under §266 of the Judicial Code. (R. 1). To the Bill of Complaint, the defendants filed their answers. (R. 31 to 85). Following hearing upon plaintiff's application for an interlocutory injunction, the parties filed their Stipulation for Affirmance of Findings of Fact, (R. 86 to 89), and their Stipulation that the hearing upon plaintiff's application for an interlocutory injunction should be treated and considered by the Court as a hearing on the application for a permanent injunction. (R. 85) Thereafter plaintiff filed its Request for Conclusions of Law, (R. 89 to 95), and defendants filed their Request for Conclusions of Law. (R. 95 to 99). Upon hearing had, the Court, on December 10, 1935, filed its opinion in the cause, together with its Findings of Fact and Conclusions of Law, and Answer to the Requests of Plaintiff and Defendants for Conclusions of Law. (R. 100 to 109). On January 7, 1936, the final decree sought to be reviewed was entered. (R. 110).

Plaintiff in its Bill of Complaint prayed

(1) that the action of the General Assembly of the Commonwealth, known as the Beverage License Law, as enacted and approved July 18, 1935, being Act 398 of the Sessions of the General Assembly for 1935, be declared and adjudged unconstitutional and void as in contravention of the rights of the Complainant under §8 of Article I of the Constitution of the United States, §2 of Article IV of the Constitution of the United States, and the 14th Amendment to the Constitution of the United States, to the extent that Complainant's rights are thereby violated;

(2) that said sections 5 (A), 5 (B), 18, 19 (C), 23 (E), 23 (G), 23 (H), 23 (P), 23 (Z), 29 (A), and 29 (B) of said Act of the Commonwealth of Pennsylvania be declared and adjudged to be unconstitutional and void, as in contravention of the Complainant's rights under §8 of Article I of the Constitution of the United States, §2 of Article IV of the Constitution of the United States, and the 14th Amendment thereto, to the extent that Complainant's rights are thereby violated;

(3) that the defendants, and each of them, their respective appointees, assistants, employees, and successors in office, and each of them, be enjoined from in any way or manner whatsoever enforcing against Complainant, and other importing distributors of malt and brewed beverages similarly situated, the provisions of said Beverage License Law, and the regulations issued thereunder, including Regulation 51, or any part or parts thereof, insofar as they contravene the provisions of the Constitution of the United States, and insofar as they affect the rights of the Complainant to import and sell malt and brewed beverages within the Commonwealth of Pennsylvania, and from attempting to enforce against Complainant, and other importing distributors of malt and brewed beverages

similarly situated within the Commonwealth of Pennsylvania, any of the provisions of said statute or regulations in said complaint complained of, and from instituting or causing to be instituted any prosecutions or proceedings, civil or criminal, against this Complainant, its officers, agents, or employees, to enforce any of such provisions of said statute or regulations.

SPECIFICATIONS OF ASSIGNED ERRORS

The Assignments of Error upon which appellant will rely present the questions which may be thus summarized:

1. That the Court below erred in holding that the provisions of the Pennsylvania "Beverage License Law" which discriminate against the malt and brewed beverages manufactured outside the State of Pennsylvania by imposing burdens thereon, and the dealer therein, which are not imposed upon like beverages manufactured within the state, are valid and not in excess of the powers of such state as limited by Article 1, Section 8, of the Constitution of the United States;

2. That the Court below erred in denying the appellant the injunctive relief prayed in its Bill of Complaint and in dismissing the same;

3. That the Court below erred in holding that the provisions of the Pennsylvania Beverage License Law requiring all officers, directors, and a majority of the stockholders of a corporation applying for an "importing distributor's" license to be residents of the State of Pennsylvania are valid and not in excess of the powers of the State as limited by the 14th Amendment to the Constitution of the United States.

The Assignments of Error which present the foregoing questions are as follows:

I

The Court erred in denying the interlocutory injunction prayed by plaintiff. (Assignment of Error I, R. 112; Ruling of Court, R. 110).

II

The Court erred in denying the permanent injunction prayed by plaintiff. (Assignment of Error II, R. 112; Ruling of Court, R. 110).

III

The Court erred in entering the following Decree:

> And Now, to-wit: this 7th day of January, A. D. 1936, the plaintiff having filed its motion for an interlocutory injunction under Section 266 of the Judicial Code as amended (28 USCA Sec. 380) and upon hearing thereon before Hon. J. Whitaker Thompson, Circuit Judge, Hon. Oliver B. Dickinson, and Hon. William H. Kirkpatrick, District Judges, specially constituted in the District Court of the United States for the Eastern District of Pennsylvania to hear and determine the case, the parties agreed upon and filed a stipulation of admitted facts, and further stipulated and agreed that the hearing on said motion should also be considered as a final hearing for a permanent injunction, it is
>
> ORDERED, ADJUDGED AND DECREED that plaintiff's motion for an interlocutory injunc-

tion be and the same is hereby dismissed; and it is further

ORDERED, ADJUDGED and DECREED that the prayers of the Bill of Complaint for a permanent injunction be denied and the Bill dismissed, Plaintiff to pay costs. (Assignment of Error III, R. 112, Final judgment and decree, R. 110).

IV

The Court erred in its first Conclusion of Law, which conclusion is as follows:

"The beer, the claimed right to import which the plaintiff asks to have enforced, cannot be imported except in violation of the laws of Pennsylvania." (Assignment of Error IV, R. 113, Conclusion of Law, R. 109).

V

The Court erred in its second Conclusion of Law, which conclusion is as follows:

"The Statutes of the State, here in question, are constitutional." (Assignment of Error V, R. 113, Conclusion of Law, R. 109).

VI

The Court erred in its third conclusion of law, which conclusion is as follows:

"The importation is unlawful under the Constitution and laws of the United States." (Assignment of Error VI, R. 113; Conclusion of Law, R. 109).

VII

The Court erred in its fourth conclusion of law, which conclusion is as follows:

> "The Bill of the Plaintiff is without equity and should be dismissed, with costs." (Assignment of Error VII, R. 113; Conclusion of Law, R. 109).

VIII

The Court erred in refusing to affirm plaintiff's eleventh Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

> "11. Since under the laws of the Commonwealth of Pennsylvania the importation of beer into the State in interstate commerce from points outside the State is lawful, the State may only restrict and limit the importation thereof in accordance with the limitations imposed by the Constitution of the United States."
>
> 11. Not found as requested. The importation of beer in sofar as in violation of the laws of Pennsylvania is likewise unlawful under the Constitution and laws of the United States." (Assignment of Error VIII, R.113; Ruling of Court, R.107).

IX

The Court erred in refusing to affirm plaintiff's twelfth Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

> "12. Beer, when imported from one state into another, upon arrival in the state of destination, falls in the same legal category as like products of domestic origin; and since, under the laws of the Commonwealth of Pennsylvania, beer is a legitimate

article of commerce, the State cannot subject imported beer or the dealer thereof to any burdens and impositions which are not imposed upon domestic beer or the dealer thereof."

"12. Not found as requested." (Assignment of Error IX, R.114; Ruling of Court, R.107).

X

The Court erred in refusing to affirm plaintiff's thirteenth Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

"13. The Commonwealth of Pennsylvania, in regulating, licensing, taxing, or restricting interstate commerce in beer, cannot in the exercise of its police power discriminate against beer or the dealer thereof solely because of its origin outside the state.'"

"13. Not found because an abstraction. The Act of the Pennsylvania Assembly restricting and prohibiting the importation of beer is a lawful exercise of the public powers of the State and all importations in violation of the laws of the State are forbidden by the Constitution and laws of the United States and unlawful." (Assignment of Error X, R. 114; Ruling of Court R. 107).

XI

The Court erred in refusing to affirm plaintiff's fourteenth Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

"14. Since the manufacture and sale of beer is a lawful business, and so recognized by the laws of the Commonwealth of Pennsylvania, neither the Act of Congress known as the Webb-Kenyon Act nor

the 21st Amendment to the Constitution of the United States permits the Commonwealth of Pennsylvania to discriminate against beer of foreign manufacture merely because of its origin outside the state. Such a discrimination constitutes an undue and unconstitutional burden upon interstate commerce."

"14. Not found as requested." (Assignment of Error XI, R. 115; Ruling of Court, R. 107).

XII

The Court erred in refusing to affirm plaintiff's fifteenth Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

"15. The provisions of the Pennsylvania Beverage License Law and the regulations issued thereunder impose an unconstitutional burden upon interstate commerce in attempting to tax complainant, a distributor of beer manufactured outside the state, at a rate higher than that imposed upon a distributor of beer of domestic origin."

"15. Not found as requested." (Assignment of Error XII, R. 115; Ruling of Court, R. 107).

XIII

The Court erred in refusing to affirm plaintiff's sixteenth Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

"16. The provisions of the Pennsylvania Beverage License Law of 1935, which exact of complainant, a distributor of beer manufactured outside the state, a license fee in excess of that required of a distributor of beer manufactured within the state,

unfairly discriminate against the product of another state solely because of its origin, rest upon no rational basis, are arbitrary and capricious, and deprive complainant of its liberty and property, without due process of law, and deny to it the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States."

"16. Not found as requested." (Assignment of Error XIII, R. 115; Ruling of Court, R. 107).

XIV

The Court erred in refusing to affirm plaintiff's seventeenth Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

"17. The provisions of the Pennsylvania Beverage License Law of 1935 that all the officers and directors of complainant shall be residents of the Commonwealth of Pennsylvania for two years before Complainant can receive a license as an importing distributor of beer, bears no substantial relationship to the State's regulation and control of the business, rests upon no rational basis, is arbitrary and unreasonable, and deprives complainant of its liberty and property, without due process of law, and denies to it the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States."

"17. Not found as requested." (Assignment of Error XIV, R. 116; Ruling of Court, R. 107).

XV

The Court erred in refusing to affirm plaintiff's eighteenth Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

"18. The provision of the Pennsylvania Beverage License Law of 1935 that the owners of a majority of complainant's stock shall be residents of the Commonwealth of Pennsylvania for two years before complainant can receive a license as an importing distributor of beer, bears no substantial relationship to the State's regulation and control of the business, rests upon no rational basis, is arbitrary and unreasonable, and deprives complainant of its liberty and property without due process of law, and denies to it the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States."

"18. Not found as requested." (Assignment of Error XV, R. 116; Ruling of Court, R. 107).

XVI

The Court erred in refusing to affirm plaintiff's nineteenth Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

"19. Since the complainant possesses, within the Commonwealth of Pennsylvania, tangible property and the good will, trade and custom of a going business there conducted, and since the enforcement of the unconstitutional provisions of the Pennsylvania Beverage License Law of 1935 will involve a direct invasion of these property rights, resulting in irreparable injury thereto, complainant is entitled to injunctive relief.

"(See: Truax v. Raich, 239 US 33;
M. Schnadler Bottling Co. v. Welch, 42 Fed. 561)"

"19. Not found as requested." (Assignment of Error XVI, R. 117; Ruling of Court, R. 107).

XVII

The Court erred in refusing to affirm plaintiff's twentieth Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

"20. An actual and immediate controversy exists between the complainant and defendants who, unless restrained, will enforce the aforesaid unconstitutional provisions of the Pennsylvania Beverage License, Law of 1935, the enforcement of which will inflict upon complainant irreparable damage and result in the ruination of its business and the destruction of its property and property rights. Since, by its own terms, the provisions of said Law are severable, and the validity of other provisions of said law is not here involved, an injunction shall issue restraining the defendants from requiring of complainant, a distributor of beer imported from without the State of Pennsylvania, a license fee in excess of that exacted of a distributor of beer manufactured within the State, and further restraining defendants from enforcing those provisions of said law which deny to the complainant an importing distributor's license because all its officers and directors and the holders of 51% of its stock are not residents of the Commonwealth of Pennsylvania."

"20. Not found as requested." (Assignment of Error XVII, R. 117; Ruling of Court, R. 107).

XVIII

The Court erred in its answer to the defendant's second Request for Conclusions of Law, which Request and the answer thereto are as follows:

"2. These acts were passed by the Commonwealth of Pennsylvania in exercise of its police power as

reinforced by the Twenty-first Amendment of the Constitution of the United States, in regulation of liquor traffic."

"2. Not found as requested because an abstraction. The Pennsylvania Acts of Assembly were the lawful exercise of the police powers of the State and all importations of intoxicating liquors in violation of the laws of the State are unlawful under the Constitution and laws of the United States." (Assignment of Error XVIII, R. 118; Ruling of Court, R. 107).

XIX

The Court erred in affirming the defendant's Fifth Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

"5. The distributor licensee, as indicated in Section 2, subdivision (c), is described and limited to one who engages in the purchase of malt or brewed beverages from Pennsylvania manufacturers only, or from importing distributors and to the resale of malt or brewed beverages in the original sealed packages as prepared for the market by the manufacturers, and may not sell for consumption on the premises where sold or in quantities of less than 288 fluid ounces."

"5. Found as Requested." (Assignment of Error XIX, R. 118; Ruling of Court, R. 107).

XX

The Court erred in its answer to the defendant's seventh Request for Conclusions of Law, which Request and the Answer thereto are as follows:

"7. From these provisions, it appears that the importing distributor is granted superior rights over

and above the distributor, in that he may buy either from domestic or foreign manufacturers or domestic or foreign distributors, and may resell not only to retail dispensers but also to other distributors; whereas, distributors are restricted in their purchase from domestic manufacturers and/or importing distributors and are denied the right to purchase from foreign manufacturers or foreign or domestic distributors, or to sell to other distributors. In view of this differentiation of privileges, the difference in the license fee being $400.00 in the case of a distributor and $900.00 in the case of an importing distributor. is not only reasonable but justified."

"7. The classification of dealers as distributors and importing distributors is a lawful classification and the imposition of different license fees is likewise lawful." (Assignment of Error XX, R. 119; Ruling of Court, R. 107).

XXI

The Court erred in affirming the defendant's eighth Request for Conclusions of Law, which Request and the action of the Court thereon are as follows:

"8. A state, under its police power, as reinforced by the Twenty-First Amendment of the Constitution of the United States, may lawfully classify licensees engaging in the traffic of intoxicating liquors, fix license fees for each class, change such classifications and fees from time to time as its Legislature, in its wisdom, deems proper, and may limit the extent to which licensees in various classes may engage in such traffic, and also prescribe the conditions under which such classes of licenses may be issued."

"8. Found as requested." Assignment of Error XXI, R. 119; Ruling of Court, R. 108):

XXII

The Court erred in its answer to the defendant's Ninth Request for Conclusions of Law, which Request and the answer thereto are as follows:

"9. The provision requiring that corporation licensees, whether domestic or foreign, to conform to the requirement that the officers and directors and majority of stockholders be residents of the Commonwealth of Pennsylvania is entirely reasonable, in view of the well known fact that the regulation of traffic in intoxicating liquors can only be adequately enforced, if at all, through the medium of criminal prosecution, and such means would be unavailing if corporations be permitted to carry on such business with non-resident officers who are beyond the reach of criminal process. This requirement simply places corporate officers upon the same level with individuals. In this, there is no discrimination since the law also requires individuals to be residents."

"9. Not found as requested because argumentative. The requirement of the Pennsylvania law that the officers and directors and a majority of the stockholders of corporation licensee, whether domestic or foreign, be residents of the State is a lawful exercise of the police powers of the State." (Assignment of Error XXII, R. 119; Ruling of Court, R. 108).

XXIII

The Court erred in its answer to the defendant's Tenth Request for Conclusions of Law, which Request and the answer thereto are as follows:

"10. Even if the provisions regulating the issuance of the importing distributors' licenses and fees

be held unconstitutional, Section 32A, which provides that "The provisions of this act shall be severable, and if any of the provisions shall be held to be unconstitutional, such decision shall not affect the validity of any of the remaining provisions of this act" and "It is hereby declared as the legislative intent that this act would have been adopted had such unconstitutional provision not been included therein." leaves the effect of the general prohibitory clauses unimpaired. As a consequence of which and the operation of the Twenty-First Amendment, any sales by the complainant would still be unlawful. Under such circumstances, a court of equity will not issue injunctions because its action would be futile and vain."

"10. Not found as requested because argumentative. The injunction prayed for in the Bill should not be granted." (Assignment of Error XXIII, R. 120; Ruling of Court, R. 108).

XXIV

The Court erred in its answer to the defendant's Eleventh Request for Conclusions of Law, which Request and the answer thereto are as follows:

"11. The public policy of the Commonwealth of Pennsylvania with regard to dispensing of intoxicating liquors, as evidenced by Section 28, Subdivision (f) of the Beverage License Law of 1933, as amended in 1935, is against permitting the manufacturer of intoxicating liquor of any kind being interested directly or indirectly in or in any wise financing retail or wholesale licensees or dispensers, whether as creditor or as stock owner. For this purpose, Subdivision (3) of Section 28 prohibits stock ownership, inter alia, of either a distributor or an importing distributor by a manufacturer, domestic or for-

eign. The ownership of the complainant's entire capital stock by the foreign manufacturer is directly in conflict with this public policy and renders the complainant absolutely ineligible to be licensed either as an importing distributor or even as a distributor.'

"11. Not found as requested because argumentative. It is the policy of the law of Pennsylvania that distillers of whisky and brewers of malt liquors should not be interested in the sale at retail of the liquors manufactured by them. It is a valid exercise of the police powers of the State to refuse to license a manufacturer to sell at retail or to prohibit stock ownership by a manufacturer of either a distributor or an importing distributor, domestic or foreign. The plaintiff has not shown itself to be eligible to receive authority under the laws of Pennsylvania to be an importing distributor." (Assignment of Error XXIV, R. 121; Ruling of Court, R. 108).

XXV

The Court erred in its answer to the defendant's Twelfth Request for Conclusions of Law, which Request and the answer thereto are as follows:

"12. The complainant in this case does not come into a court of equity with clean hands, in that it is operating under a distributor's license issued by the County Treasurer of Philadelphia in violation of the law as it was before the amendment of 1935. Section 12 of which law authorizes the issuance of such licenses by the county treasurer only 'to corporations organized in or duly authorized to transact business in this Commonwealth and all of whose officers and directors shall be citizens of the United States who have also been residents of this Common-

wealth for at least three years immediately preceding, the application for license.' The complainant in this case having alleged in the bill that its officers and directors were nonresidents of this Commonwealth."

"12. Not found as requested because argumentative. The plaintiff has not shown itself eligible to receive authority to be an importing distributor under the laws of Pennsylvania." (Assignment of Error, XXV, R. 121; Ruling of Court, R. 108).

XXVI

The Court erred in its answer to the defendant's Thirteenth Request for Conclusions of Law, which Request and the answer thereto are as follows:

"13. Courts will not interfere by injunction where the injury inflicted or threatened is merely the vexation of arrest and punishment of complainant, who is left free to litigate the question of unconstitutionality of the statute or ordinance or its construction or application in making his defense at trial or prosecution for its violation. The remedy at law by indictment and prosecution is presumed to be adequate. It is only where the statute or ordinance is unconstitutional or otherwise invalid, and where, in the attempt to enforce it, there is a direct invasion of property rights resulting in irreparable injury, that an injunction will issue to restrain the enforcement thereof. Both of these elements are indispensable, and the latter element is not present where, as here, it appears that the injury or loss to the complainant's business or rights of property would be only such as would incidentally flow from the arrest or prosecution thereunder."

"Long v. Metzger et al., 301 Pa. 449-454."

"13. Not found as requested because argumentative. The plaintiff has no right to the injunction prayed for." (Assignment of Error, XXVI, R. 122; Ruling of Court, R. 108).

XXVII

The Court erred in its answer to the defendant's fifteenth Request for Conclusions of Law, which Request and the answere thereto are as follows:

"15. The Twenty-First Amendment to the Federal Constitution must be regarded as divesting intoxicating liquor of any protection of the Interstate Commerce Clause. The right of a state to prohibit totally, as is in said Twenty-first Amendment guaranteed, necessarily involves the right to prohibit conditionally, and especially so where the conditions are neither discriminatory or unreasonable, as here."

"15. Not found as requested because argumentative. The Twenty-first Amendment prohibits the importation of intoxicating liquors into a State if the importation is in violation of the law of the State. The importation here in question would be in violation of the laws of Pennsylvania. It is in consequence prohibited by the Twenty-first Amendment and by the Webb-Kenyon Act." (Assignment of Error, XXVII, R. 123; Ruling of Court, R. 108).

XXVIII

The Court erred in its answer to the defendants' sixteenth Request for Conclusions of Law, which Request and the answer thereto are as follows:

"16. The provisions of Section 2 of Article IV of the Federal Constitution, providing the citizens

of each state shall be entitled to all privileges and immunities of the citizens of the several states, cannot be invoked by this complainant under the well settled rule that a corporation is not a citizen within the meaning of this provision of the Constitution."

"16. Not found as requested because argumentative. The Pennsylvania Statute is not unconstitutional by reason of anything contained in Sec. 2 of Article IV of the Constitution of the United States." (Assignment of Error, XXVIII, R. 123; Ruling of Court, R. 108.)

XXIX

The Court erred in its answer to the defendants' seventeenth Request for Conclusions of Law, which Request and the answer thereto are as follows:

"17. Neither does the clause of the Fourteenth Amendment, forbidding a state to deny to any person within its jurisdiction the equal protection of the law, apply, because laws of the State of Pennsylvania do not deny to the complainant equal protection of its laws. The complainant is granted privileges equal with licensees of the same class, whether, individual or domestic or foreign corporation. Neither can said clause be invoked by the complainant's parent company, the Premier Pabst Corporation, because it is not a complainant in this bill, nor is it a person within the jurisdiction of the State of Pennsylvania."

"17. Not found as requested because argumentative. The Pennsylvania Statute is not unconstitutional because of anything contained in the Fourteenth Amendment of the Constitution of the United States." (Assignment of Error, XXIX, R. 123; Ruling of Court, R. 109).

XXX

The Court erred in affirming the defendants' eighteenth Request for Conclusions of Law, which Request and the answer thereto are as follows:

> "18. The right to engage in the sale of intoxicating liquors is not one of the privileges or immuities of citizens of the United States, which the states are thereby forbidden to abridge. Nor can such restrictive statutes be said to deprive persons of liberty or property without due process of law. Nor, if not entirely arbitrary in their discrimination between persons, do they deprive anyone of the equal protection of the law. Phillips v. Mobile, 208 U.S. 472."
>
> "18. Found as requested." (Assignment of Error XXX, R. 124; Ruling of Court, R. 109).

SUMMARY OF THE ARGUMENT

I

A state may not, under the guise of its police power, discriminate against products because of their foreign origin by imposing a tax either directly upon the articles themselves, or indirectly by requiring a license for their sale.

Webber v. *Virginia,* 103 US 344;
Guy v. *City of Baltimore,* 100 US 434;
Welton v. *Missouri,* 91 US 275;
Brown v. *Maryland,* 12 Wheat. 419;
Sonneborn v. *Keeling,* 262 US 506;
Woodruff v. *Parham,* 8 Wall 123;
Baldwin v. *Seelig,* 294 US 511;

A

Prior to the enactment of the federal statutes with respect to commerce in liquor, a state had no greater power over interstate commerce in intoxicating liquor than it had over any other article of commerce.

Tiernan v. *Rinker,* 102 US 123;
Walling v. *Michigan,* 116 US 446;
Leisy v. *Hardin,* 135 US 100;
License cases, 5 How. 504,
Wilkerson v. *Rahrer,* 140 US 545;
Bowman v. *C & NW RR,* 125 US 465.

B

The Wilson Act, (tit. 27, §127, USCA, Aug. 8, 1890, Appendix Pg. 95), while extending the police power of the state to intoxicating liquor in the original package in which it was introduced into the state, did not withdraw the protection of the commerce clause to the extent of permitting a state to discriminate against liquors solely because of their out-of-state origin.

Vance v. *Vandercook,* 170 US 438;
Rhodes v. *State of Iowa,* 170 US 412;
Scott v. *Donald,* 165 US 58;
Mpls. Brew Co. v. *McGillivray,* 104 Fed. 258;
State v. *Zophy,* 14 S. D. 119, 84 NW 391;
Commonwealth v. *Petranich,* 183 Mass. 217,
66 NE 807.

C

The Webb-Kenyon Act, (tit. 27, §122, USCA, March 1, 1913, Appendix Pg. 95), merely extending the principle of the Wilson Act to the time when the liquors reached the borders of the state.

Adams Express Co. v. *Kentucky,* 238 US 190;
James Clark Distil. Co. v. *Western Md. Ry. Co.* 242 US 311;
Brennan v. *So. Express Co.,* 106 S. C. 102, 90 SE 408;
Evansville Brewery v. *Excise Commission,* (D. C. Ala.), 225 Fed. 204;
Triner v. *Arundel,* (D. C. Minn.), 11 Fed. Sup. 145;
Youngs Market v. *State Board,* (S. D. Cal.), 12 Fed. sup. 140;
Pac. Fruit & Produce Co. v. *Martin,* (W. D. Wash.), (not officially reported, see appendix).

D

The XXI Amendment to the Constitution of the United States, adopting the language of the Webb-Kenyon Act, construed in the light of the decisions, grants no further power to the states in dealing with intoxicating liquors transported in interstate commerce into the state than was previously conferred by the Webb-Kenyon Act. It simply placed it beyond the power of the Congress to withdraw the power previously granted.

Youngs Market v. *State Board,* (S. D. Cal.), 12 Fed. Sup. 140.

The protection of the commerce clause does not cease with the cessation of actual commerce but extends to protect an article against unfair discrimination by a state even though it has come to rest and has been commingled with the general mass of the property of the state and thereby subject to the laws thereof.

Darnell v. *Memphis*, 208 US 113;
Baldwin v. *Seelig*, 294 US 511;
Bethlehem Motors Co. v. *Flynt*, 256 US 421,

The law of any state which unfairly discriminates against the product of another state because of its origin, either by way of taxation upon the product itself or the agent handling it, or by onerous regulations, which burden is not equally borne by products of local origin, is unconstitutional and void, even though the product has, as in the case of liquors, been divested of its immunity as an article of interstate commerce by federal statutory and constitutional provisions, or, in the case of other products, has ceased to be an article of commerce by being commingled in the general mass of property within the state.

(See cases supra).

E

The Beverage License Law which purports to classify distributors upon the basis of whether the purchase of the product which they sell is from a person within the state or from a person without the state, and which imposes a higher license fee and exacts a larger bond from the one engaged in the purchase of liquors from an out-of-state dealer or manufacturer than is required of the one engaged in the purchase

of liquors from a manufacturer or dealer within the state, directly discriminates against the liquors of a foreign state and those engaged in handling them.

(See cases supra).

II

A

Appellant, as the holder of a distributor's license issued by the State of Pennsylvania, under the provisions of the 1933 Act, engaged in business thereunder at the time of the commencement of this action and licensed to do business within the state as a foreign corporation, may properly challenge the validity of the Beverage License Law of 1935, which deprives it of rights guaranteed to it under the Constitution.

Power Mfg. Co. v. *Saunders*, 274 US 490;
Kentucky Finance Corp. v. *Paramount Auto Exc.* 262 US 544;
Quaker City Cab Co. v. *Pennsylvania*, 277 US 389.

B

Appellant may properly challenge the constitutionality of the statute for the further reason that all provisions of the Beverage License Law relating to "Distributors' Licenses" or "Importing Distributors' Licenses" are so inseparably connected with and dependent upon the invalid "Importing Distributors' License" fee provisions, that they must fall together, and, there being no valid law requiring any license whatever of appellant to carry on its business, appellant is entitled to equitable relief against the threatened enforcement of the in-

valid provisions of the statute.

Railroad Retirement Board v. *Alton Ry. Co.*, 295 US 330;
Hill v. *Wallace*, 259 US 44.

III

The provisions of the Beverage License Law, in limiting the issuance of a license to a corporation whose officers and directors have been residents of the state of Pennsylvania for a period of two years prior to the making of the application therefor, and 51% of whose stockholders have been residents of the state for a like period, are arbitrary, capricious, and without any reasonable relation to the purposes for which the police powers of the state may be lawfully exercised.

Liggett v. *Baldrige*, 278 US 105.

ARGUMENT

I

May a state, whose laws permit the purchase and sale of intoxicating liquor, place discriminatory burdens or taxes upon liquors produced outside the state or upon persons engaged in their sale under the guise of exercising its police power?

Generally, the question raised by this appeal is as above stated. Specifically, the question is whether the Act of the Legislature of Pennsylvania entitled "Beverage License Law" enacted July 18, 1935, which by its several provisions estab-

lishes a licensing system, creating among other classes of licenses a "distributors' license" and an "importing distributors' license" is a valid exercise of the police powers of such state.

By this legislation, wholesale dealers in malt and brewed beverages are divided into two classes: (1) those who purchase their products from manufacturers or dealers within the state, and (2) those who purchase their products from manufacturers or dealers outside the state.

For one to engage in the business of purchasing and selling at wholesale a product manufactured within the state of Pennsylvania, a fee of only $400 and a bond of only $1,000 is required by this Act. For one to engage in a business identical therewith except to purchase his product from a manufacturer or dealer located outside the State of Pennsylvania, a fee of $900 and a bond of $2,000 is required. (Sec. 19 (b) and (c) Appendix Pg. 82).

That this is the result and effect of the law complained of in this action was freely admitted by the defendants below and premised the opinion in the lower court. That such legislation, if directed at a subject other than intoxicating liquors, would exceed the powers of the state as restricted by the commerce clause and the Fourteenth Amendment to the Constitution is as readily and freely admitted. This Court has on so many occasions expressed the undoubted purpose of the constitutional limitation placed on the power of a state to legislate upon the subject of interstate commerce and has so frequently referred to our colonial history, which so emphasized the importance of such limitation in the framing of

the Constitution, that appellant does no more than to preface this argument by a mere suggestion of these subjects.

We proceed with this argument by first examining the contentions advanced by appellee in the trial below, that intoxicating liquors have, by the Acts of Congress and the Twenty-first Amendment, been withdrawn from all protection under the commerce clause and the Fourteenth Amendment, which they would otherwise be afforded as articles of lawful commerce between the states. Because of this asserted unlimited power of the state to so deal with intoxicating liquors, it is well to leaf back through the history of this court in its pronouncements relating to this subject and examine each in the light of the prevailing legislation to gain from it the chart to direct our path through the more recent congressional acts.

A

Before the Wilson Act

The first legislation of Congress extending the power of a state over intoxicating liquor in interstate commerce was the Wilson Act passed in 1890. Prior to the passage of this Act, the state had no power to restrict, burden, regulate, or prohibit interstate traffic in intoxicating liquor, and the immunity of the liquors transported into the state from interference by the state continued so long as the liquor remained in its original and unbroken package.

Wilkerson v. *Rahrer*, 140 US 545;
License cases, 5 How. 504;
Bowman v. *C. & N. W.*, 125 US 465;
Leisy v. *Hardin*, 135 US 100.

B

Under the Wilson Act

The Wilson Act marks the first extension of the state's power to deal with intoxicating liquor when surrounded with the immunity which would otherwise exist under the commerce clause. It was passed to avoid the effect of the "original package" doctrine, and to permit the state to prohibit or regulate the sale of intoxicating liquor after being imported into the state but before being released from its original package. This purpose was so expressed by this court in Vance v. Vandercook, 170 US 438, 446, where it is said:

> "In the first of these cases the constitutional power of Congress to pass the enactment in question was upheld, and the purpose of congress in adopting it was declared to have been to allow state laws to operate on liquor shipped into one state from another, so as to prevent the sale in the original package in violation of state laws."

That this Act did not withdraw intoxicating liquors from the protection of the Commerce Clause, while they remained in their unbroken packages, to such an extent that a state was left free to discriminate against or place burdens upon their sale that were not likewise imposed upon similar products originating within the state, was made clear in Scott v. Donald, 165 US 58, 41 L ed 632, the first case decided under that Act. The legislature of the State of South Carolina, by the passage of the State Dispensary Act, undertook this very thing, and this court left no doubt as to the purpose of this type of legislation by the Congress, declaring itself firm-

ly against any view that the state might exercise its police powers in a manner that would result in discrimination against the liquors of another state.

Because the legislation which followed the Wilson Act is but a mere extension of the same power, enacted for the same purpose, to attain more completely the same object, the views of this court, as expressed in Scott v. Donald, supra, are of the utmost importance in determining the effect of the Webb-Kenyon Act, the principles of which are now embodied in the 21st Amendment. This court in that case said:

> "That law was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. When that law provided that 'all fermented, distilled, or intoxicating liquors transported into any state or territory, remaining therein for use, consumption, sale, or storage therein, should, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise,' evidently equality or uniformity of treatment under state laws was intended. The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspec-

> tion and sale of all domestic and imported liquors and be valid. But the state cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful. * * *
> "It is sufficient for the present cases to hold, as we do, that when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other states; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting state as against similar products of the other states."

The conclusion of this Court so announced in the *Scott* v. *Donald* (supra) case was reaffirmed and reiterated in the subsequent case of *Vance* v. *Vandercook* (supra) in which it was said:

> "The conclusion expressed on that branch of the case was this and nothing more, that although the Act of Congress authorizes a State law to attach to an original package so as to prevent its sale, it did not contemplate and sanction the operation of a state law which injuriously discriminated against the products of other states, and which in consequence of such discrimination was not a police law in the correct sense of those words."

Under the principle of these decisions, legislation of several states, purportedly passed in the exercise of the state's police power over the field of state action, as enlarged by the Wilson Act, were held void as in conflict with the commerce

clause, where their provisions operated to discriminate against the liquors of another state.

Minneapolis Brewing Co. v. *McGillivray,*
(CC,SD 1900), 104 Fed. 258;
State v. *Zophy,* 14 S. D. 119, 84 NW 391;
Commonwealth v. *Petranich,*
183 Mass. 217, 66 NE 807.

C

Under the Webb-Kenyon Act

The Webb-Kenyon Act merely moved the sphere of the state's power over interstate commerce in liquor from the point where, under the Wilson Act, the commerce had ceased but the liquors remained in their original package to the borders of the state, and permitted the state to exercise its police powers over liquors sought to be introduced in that state in violation of its valid laws. That it did not grant to the state any power to legislate in a manner which would result in a discrimination against the products of another state is clear from the scope of the Act and the previously declared views of this court upon legislation of the same type enacted pursuant to the same purpose.

In *James Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 US 311, 330, this Court recognized that Congress in enacting the Webb-Kenyon Act was exerting a power essentially identical to the power exerted in the passage of the Wilson Act. In this connection it was said:

> "As the power to regulate which was manifested in the Wilson Act, and that which was exerted in

> enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, * * *"

It did not purport to set at naught the guarantees of the commerce clause forbidding a state to wall itself apart from the commerce of another state and at the same time permit the liquors produced within its borders to be the subject of commerce.

In *Brennen* v. *Southern Express Company*, 106 S. C. 102, 90 SE 402, it was said:

> "The Act of Congress of March 1, 1913, known as the Webb-Kenyon Act, does not affect the decision of the question; for, while that Act does divest intoxicating liquors shipped into a state in violation of its laws of their interstate character and withdraws from them the protection of Interstate Commerce, it evidently contemplated the violation of only valid state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states which are recognized as subjects of lawful commerce by the law of the state making such discriminations, nor the power to make unjust discriminations between its own citizens.
>
> "Substantially the same thing was said in Scott v Donald, supra, of the Wilson Act, by which Congress made liquors shipped into a state subject to its law after delivery thereof to the consignee. The principle there decided was reaffirmed in Vance v Vandercook, 170 US 438.
>
> "It follows that the Circuit Court erred in refusing the relief prayed for."

That the Webb-Kenyon Act did not remove intoxicating liquor from all protection of the commerce clause is held by this court in *Adams Express Co.* v. *Kentucky*, 238 US 190, 199, where it is said:

> "Except as affected by the Wilson act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon act, which prohibits the transportation of liquors into the state, to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution."

The evident purpose of the Webb-Kenyon Act was to extend the field over which the police powers of a state might be exercised in order that its policy of prohibition or regulation upon the subject of intoxicating liquors might not be entirely thwarted by a resort to the immunity of interstate commerce channels. There is nothing in this purpose which would countenance the thought that a state could so exercise this power as to deny commerce in the article between that state and another, and at the same time freely permit trade and commerce in the article within the state. No more could a state assert the power to do this than it could assert the power under this Act to stop at its borders liquor sought to be transported through its jurisdiction and destined to a state beyond. Yet, under the reasoning of the lower court in this case, it could only be concluded that that court felt such power to be fully possessed by the state.

Here is where appellant asserts that the lower court misconceived the purpose and effect of this statute. The premise

of the lower court's opinion in this case is its conclusion. To accept the premise is but to state the conclusion. The opinion says:

> "If the importation of intoxicating liquor is acceptable to a state, it retains its status as the legitimate subject of interstate commerce, but if it is forbidden importation by the state laws, the United States likewise forbid it. Interstate commerce is spoken of under the figure of a stream whose free flow cannot be interrupted by any state law. Any state may, however, remove intoxicating liquor as a subject of interstate commerce. When it does so by passing a law on the subject of its importation, the law of the United States forbids its further importation if in violation of the laws of the state. Such is now the law and that the law was once otherwise goes for naught. * * *
>
> "The question, however, is not one of his right to enter, but to give entrance to the intoxicating liquor. Such entrance is forbidden by the state law and when so forbidden, is, as we have said, barred also by the Twenty-First Amendment. * *.*
>
> "Moreover, without the Twenty-First Amendment the Pennsylvania Act would not have infringed any constitutional provision with the Webb-Kenyon Act in force All the commerce clause does it to commit the control of imports to Congress. What Congress permits is not unconstitutional. Some of the provisions of the Pennsylvania Act do undoubtedly discriminate in favor of the citizens of the state."

Such reasoning would, of necessity, hold valid a state law freely permitting the sale of liquors manufactured within the state, but prohibiting absolutely the introduction into the state of any liquor manufactured in another state. To say that

such was the measure of power granted a state by Congress, under the Webb-Kenyon Act, is to completely ignore the purpose of the Act and give no effect to the decisions of this Court which now provide their setting.

Certain it is that the Webb-Kenyon Act prohibits the introduction into a state of intoxicating liquors in violation of the laws of the state, but equally certain it is that a statute of a state is not to be accepted as the law of the state, if, in its passage, the legislature exceeded the limitations upon its power as expressed in the United States Constitution.

The question here is: Did the state of Pennsylvania have the power to enact a measure which the opinion of the lower court concedes discriminated against the products of another state and the persons dealing in them? The answer to this question, appellant asserts, is found in the decisions of this court in *Scott* v. *Donald* (supra) and *Vance* v. *Vandercook* (supra).

To impute to the legislature an intent, in the passage of the Webb-Kenyon Act, to permit a condition to exist in the interstate commerce of liquor whereby one state might prohibit the introduction into its borders of the liquors of another, and that other to pass legislation in retaliation thereof, would be to assume that which is not to be inferred from either the object sought or the language used. Neither is it to be assumed that Congress intended to permit a condition of chaos in the commerce of liquors between states that the framers of our Constitution by the commerce clause so carefully avoided.

Appellant asserts that the situation in respect to the power of a state over liquors actually within the channels of interstate commerce is much akin, if not identical, to the power of a state over other articles introduced into the state in interstate commerce, after such commerce has ceased and the articles have become commingled with the general mass of the property of the state. Over such property the state may exercise its powers, provided it does not single such article out, because of its origin, and direct discriminatory burdens against it. Intoxicating liquor is, while in the channels of interstate commerce, subject to the police powers of the state, but an Act which is directed against it, solely because of its out-of-state origin, is not an Act passed within the scope of a proper exercise of its police powers.

If, as appellant thus conceives the purpose and scope of the Webb-Kenyon Act, intoxicating liquors, while actually in the channels of interstate commerce, are subject to the police powers of the state only to the same extent that other articles introduced into the state in interstate commerce are subject to such powers after such commerce has entirely ceased, then the cases of this Court, decided before any of the Acts of Congress upon this subject, are as controlling and decisive today upon a situation where the liquors are not within the channels of commerce when the state attempts to exercise its power over them as they were the day of their decision.

Thus, in *Ticrnan* v. *Rinker,* 102 US 123, this Court had before it the question of the validity of an Act of the State of Texas which exacted a license tax of one engaged in the sale of intoxicating liquors manufactured in another state while exempting one engaged in the sale of liquors manufac-

tured in the state. The liquors were not in the channels of commerce and no rights were asserted upon such basis. There was no question but that the state, in the exercise of its police power, might have prohibited their sale absolutely, but the Court held that it could not permit the sale of liquors manufactured within the state and prohibit the sale of liquors manufactured outside the state; it could not permit the sale of liquor manufactured within the state without a license and exact a license as a condition to the sale of liquor manufactured outside the state.

The Webb-Kenyon Act dealing only with liquor in the channels of interstate commerce, it is inconceivable that a state now possesses greater power in respect to its legislation over liquor in which actual commerce has ceased than was possessed over like liquors prior to the Webb-Kenyon Act. Thus, appellant asserts that the language of this Court in *Tiernan* v. *Rinker* is directly applicable in its expression of the limitation upon the power of a state to discriminate and condems legislation of the type passed by the State of Pennsylvania now before the Court in this case. It is there said:

> "The petitioners rely upon the ruling of this court in the case of Welton v Missouri (91 US 275, XXIII, 347) to sustain their position. There the State had exacted the payment of a license tax from traveling peddlers who dealt in the sale of goods, wares, and merchandise which were not the growth, product or manufacture of the State, and required no such license tax from similar traders selling goods which were the growth, product or manufacture of the State. And this court held, following in that respect the ruling in Brown v Maryland, 12 Wheat., 419, that the tax exacted from dealers in

goods before they could be sold was, in effect, a tax upon the goods themselves, and that the legislation which thus discriminated against the products of other States in the conditions upon which they could be sold by a certain class of dealers, was in conflict with the commercial clause of the Constitution. * * *

"If the State can exact a license tax from one class of traders for the sale of goods which are the growth, product or manufacture of other States, it can exact the license from all traders in such goods, and the amount of the tax will rest in its discretion. 'Imposts,' the Court said 'operating as an absolute exclusion of the goods, would be possible, and all the evils of discriminating state legislation favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.' The court, therefore, held that the commercial power of the Federal Government over a commodity continued until the commodity had ceased to be the subject of discriminating legislation in any State by reason of its foreign character, and that this power protects it after it has entered the State, from any burdens imposed by reason of its foreign origin. * * * The doctrine of this case has never been questioned; it has been uniformly recognized and approved, and expresses now the settled judgment of the court. According to it, the Statute of Texas is inoperative, so far as it makes a discrimination against wines and beer imported from other States, when sold separately from other liquors. A tax cannot be exacted for the sale of beer and wines when a foreign manufacture, if not exacted from their sale when of home manufacture."

To the same effect is the case of *Walling* v. *Michigan*, 116 US 446, (451, 454), where it is said:

> "The single question therefore is, whether the statute of 1875 is repugnant to the Constitution of the United States. Taken by itself and without having reference to the Act of 1881, it is very difficult to find a plausible reason for holding that it is not repugnant to the Constitution. It certainly does impose a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the State. If this is not a discriminating tax levied against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be descriminating. It is clearly within the decision of Welton v. Missouri, 91 US 275 (Bk. 23, L. ed. 347), where we held a law of the State of Missouri to be void which laid a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares or merchandise, not the growth, product or manufacture of that State, and which did not lay a like tax upon the sale of similar articles, the growth, product or manufacture of Missouri. The same principle is announced in Hinson v. Lott, 8 Wall. 148; Ward v. Maryland, 12 Wall. 418; Guy v. Baltimore, 100 US 438; County of Mobile v. Kimball, 102 US 691, 697; Webber v. Va., 103 US 344. A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by

the Constitution upon the Congress of the United States. * * *

"Many state decisions might also be cited in which the same doctrine is announced. Thus, in the case of Higgins v. 300 Casks of Lime, 130 Mass. 1, it is said: 'The result of all these decisions is, that the several States have no authority to prescribe different regulations in relation to the commerce in certain articles, dependent upon the State from which they are brought. This rule in no manner controls or limits the power of a State to enact appropriate health or inspection laws, for such laws are necessarily uniform, and are not dependent upon place.' In State v. Furbush, 72 Maine, 495, construing a statute of Maine, the supreme court of that State says: 'The Act is unconstitutional. It allows goods manufactured in this State to be peddled free; and exacts a license fee from those who peddle similar goods which are manufactured out of the State Such a descrimination in favor of goods manufactured in this State, and against goods manufactured in other States, violates the Federal Constitution.' In State v. North, 27 Mo. 464, where an Act of Missouri imposed a tax upon merchants for all goods purchased by them, except such as might be the growth, product or manufacture of that State, and manufactured articles the growth or product of other States, it was held by the Supreme Court of that State that the law was unconstitutional and void. The court says: 'From the foregoing Statement of the law and facts of this case it will be seen that it presents the question of the power of the States, in the exercise of the right of taxation, to discriminate between products of this State and those manufactured in our sister States.' And after an examination of the causes which led to the adoption of the Federal Constitution, one of the principal of

which was the necessity for the regulation of commerce and the laying of imposts and duties by a single government, the court says: 'But, whatever may be the motive for the tax, whether revenue, restriction, retaliation or protection of domestic manufacturers, it is equally a regulation of commerce, and in effect an exercise of the power of laying duties on imports; and its exercise by the States is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to these subjects. Can any power more destructive to the union and harmony of the States be exercised than that of imposing discriminating taxes or duties on imports from other States? Whatever may be the motive for such taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measure regardless of the consequences.' See also Norris v. Boston, 4 Met. 282 (and other cases.)"

True, it is that a citation of cases decided before the Wilson Act must be with discriminate care and with an understanding of their present limitations, but let not appellees attempt to dismiss *Tiernan* v. *Rinker* and *Walling* v. *Michigan* with the mere observation that they were decided before the Wilson Act and the Webb-Kenyon Act and are thus not applicable.

This rule that an article, having its origin outside the state into whose general mass of property it has become commingled, may not be singled out by such state and made the subject of its police power because of its origin, is given expres-

sion in *Darnell* v. *Memphis,* 208 US 113, followed by *Bethlehem Motor Corp.* v. *Flynt,* 256 US 421, and quite recently found in full growth in *Baldwin* v. *Seelig,* 294 US 511.

In *Darnell* v. *Memphis,* supra this court at page 119 said:

> "As a prelude to a review of the cases referred to, we observe that while it is undoubted that it has been settled that where property which has moved in the channels of interstate commerce is at rest within a state and has become commingled with the mass of property therein, it may be taxed by such state without thereby imposing a direct burden upon interstate commerce, that doctrine, as expounded in the decided cases, including those relied upon by the court below, has always expressly excluded the conception that a state could, without directly burdening interstate commerce, discriminate against such property by imposing upon it a burden of taxation greater than that levied upon domestic property, of a like nature. * * *
>
> "As there can be no doubt within the principles so clearly settled by the decided cases, to which we have referred, that the disputed tax, which the court below sustained, was a direct burden upon interstate commerce, since the law of Tennessee in terms discriminated against property the product of the soil of other states brought into the state of Tennessee, by exempting like property when produced from the soil of Tennessee, it follows that the court below erred in deciding the tax to be valid, without reference to the reasoning indulged in by it concerning the application of the equal protection clause of the 14th Amendment. The judgment below must therefore be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

In *Bethlehem Motor Corp.* v. *Flynt,* 256 US 421 (6), in citing and following the principle announced in *Darnell* v. *Memphis,* supra, it was said:

> "The basis of the denial and its support by the supreme court is that the automobiles had passed out of interstate commerce and had reached repose in the state, and blend with the other things of the state, and became subject to intrastate regulation. It is doubtful if that be a justifiable deduction from the findings of the trial court. But comment is not necessary. It is the finding of the court that the automobiles were in the hands of the agents of the consigning corporations, and, therefore, a tax against them was practically a tax on their importation into the state. It is not necessary to say it would be useless to send them to the state if their sale could be prevented by a prohibitive tax, or one so discriminating that it would prevent competition with the products of the state. This is the ruling of the cases which we have cited. It is especially the ruling in I. M. Darnell & Son v. Memphis, supra. The imposition of such a tax is practically the usurpation of the power of Congress over interstate commerce, and therefore illegal."

No clearer expression of the limitation of the powers of a state can be found in any of the decisions of this court than that of the case of *Baldwin* v. *Seelig,* supra, where it is said at page 527:

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the

> police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended."

And of greater importance is the expression of this Court upon this very subject of intoxicating liquors when it is said, at page 528:

> "In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin. What it does is no more than to apply its domestic policy, rooted in its conceptions of morality and order, to property which for such a purpose may fairly be deemed to have passed out of commerce and to be commingled in an absorbing mass."

The position of appellant should not be misunderstood in respect to its contention that the commerce clause remains a source of protection to the commerce in intoxicating liquors. It should not be said that appellant ignores these Congressional Acts and treats the commerce in intoxicating liquor the same as commerce in other articles of trade in respect to the

powers of a state over it. To these Acts appellant gives full recognition and application in the light of their purpose as expressed in the opinions of this Court, and asserts that as they have been and are to be construed they may not be relied upon by a state as an aid to the enactment of discriminatory legislation.

D

Under the 21st Amendment

It remains only to consider whether the adoption of the 21st Amendment added to the powers of a state or removed a limitation upon the exercise of existing powers so that one state might enact legislation discriminating against liquors produced in another. If the 21st Amendment accomplished this result, it is because language when used in a constitutional amendment means something different than the same language when used in an Act of Congress. A comparison of the provisions of the 21st Amendment and of the Webb-Kenyon Act will reveal that their context is practically identical. Extraneous words omitted, the Webb-Kenyon Act reads:

> "The shipment or transportation * * * of * * * intoxicating liquor * * * from one state * * * into any other state * * * which intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used either in the original package or otherwise, in violation of any law of such state, is hereby prohibited"

While the 21st Amendment reads:

> "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited."

There was no occasion for incorporating the Webb-Kenyon Act into the Constitution in order to make its provisons fully effective and valid. This court had previously passed upon the constitutionality of that act and determined that Congress had acted within the sphere of its delegated powers in its passage. No new power was required to be surrendered by the state to the Federal Government in order to make its provisions fully effective.

The purpose of incorporating such provision in the Constitution was, therefore, not to add to the powers of the Federal Government. It was the outgrowth purely of a pledge made in the campaign for the repeal of the 18th Amendment that states might have guaranteed to them the right to pursue a policy of complete prohibition or regulation which could not be defeated by the repeal of these congressional acts. It simply placed that subject beyond the reach of Congress, adding nothing to the powers of a state and withdrawing no limitations previously imposed upon the exercise of such powers.

The 21st Amendment, having an identity of language with the Webb-Kenyon Act, and being incorporated into the Constitution to make permanent that legislation, should receive the same construction and be given the same effect that the previously cited decisions of this court, the lower courts, and the state courts, have given to the Webb-Kenyon Act.

No purpose is served by construing this amendment as giving to the state the power to place itself at war with a sister state in the commerce and trade of intoxicating liquors. Granting such powers, the results of its exercise are not difficult to foresee. Already acting upon the assumption of such power, states have enacted legislation in retaliation of the discriminatory laws of other states. A state's policy of prohibition or regulation can in no manner be aided by the extension or recognition of such power. It was neither the purpose nor the effect of this amendment to so extend it.

If the state of Pennsylvania can exact of a dealer in the liquors of another state a license fee of $900 while requiring a fee of only $400 of a dealer in the liquors of that state, it can, under the same power, entirely exempt the dealer in Pennsylvania liquor from any tax and exact a fee of a dealer in liquors of another state so high that virtual prohibition in commerce in such liquors is the result. If it may do this indirectly by license tax, it may, under the same power, do it directly by a law prohibiting absolutely the introduction into the state of liquors manufactured outside the state, while freely permitting the sale and trade in liquors manufactured in the state. Thus this court has before it not merely the narrow question of whether a state may require a larger license fee of a dealer in liquors manufactured outside the state than is required of a dealer of liquors manufactured within the state but the broader question of the power of a state to preserve to its domestic manufacturers an extensive market within its borders by denying the foreign manufacturers all access to such market.

The power is the same whether exercised in the form of onerous burdens imposed to discourage and restrict the

commerce of another state, or in the form of an absolute prohibition against it. To grant the existence of any such power is but to invite war between the states to be fought with a barrage of retaliatory laws and reprisals directed at a vast trade and commerce. The safeguards against the disturbance of domestic tranquillity would then be destroyed, all without purpose, and clearly beyond the intent and spirit of the acts and the constitutional measure which it is contended accomplish such destruction.

II

Appellant, having rights affected by the Act, may properly be heard on the question of the constitutionality of the statute.

The standing of appellant to assert the unconsitutionality of the challenged statute ought not to be the subject of question before this Court. Appellant was the holder of a distributor's license issued by the State of Pennsylvania under the provisions of the previous license law of 1933 at the time this action was commenced; it was then engaged in the business authorized to be conducted by the license; it had expended large sums of money in the development of an extensive trade within the state, and was the owner of substantial property situated therein. By this Act, appellant's right to continue in that business is entirely destroyed. Although the Act purported to preserve the right of appellant, as the holder of a distributor's license issued under the previous Act, it limits and reduces such rights to the purchase of malt and brewed beverages from manufacturers or licensees within the state.

As shown by the Stipulated Facts and the undenied allegations of plaintiff's Bill, plaintiff's business consists of the purchase of malt and brewed beverages from Premier-Pabst Corporation, which is engaged in the manufacture of malt beverages in the States of Illinois and Wisconsin, and in the sale of such liquors so purchased to customers within the State of Pennsylvania. Under the Act, appellant, as the holder of a distributor's license, may not continue in such business.

Defendants in their answer assert that appellant could not qualify for a license under the provisions of the Beverage License Law of 1935, because of the non-residence of its officers, directors, and stockholders, and that inasmuch as the officers, directors, and stockholders of appellant corporation are non-residents of the State of Pennsylvania, the license held by it was issued in violation of the provisions of the Act of 1933. There is no question concerning the validity of the license held by plaintiff in this case. There is no provision in the Act by which the rights of a licensee are terminated by a change in the residence of its officers, directors, or stockholders. The restrictions in reference to residence refer only to the time of the making of application for such license. There is no allegation in the answer of the defendants which raises any issue concerning the qualification of the appellant for a license at the time when the license was issued. Further than this, the State has stipulated that the appellant is the holder for the year 1935 of a malt liquor distributor's license, "which license authorized complainant to engage in the business, inter alia, of importing malt and brewed beverages manufactured outside the State of Pennsylvania and distributing such beverages with in the state." (See Stipulation Record 88, Par. 9).

Not only is there no allegation or proof which would support a finding that the appellant was not qualified to receive the license when issued, but the presumption is that the issuing officers of the State performed their duty and issued a license only upon a finding that the appellant was duly qualified to receive it. See

Nofire vs. *United States,* 164 US 657;
United States vs. *Chem. Foundation,* 272 US 1, 14;
United States vs. *Royer,* 268 US 394.

All that appears from the Bill or the Stipulated Facts is the residence of the officers, directors, and stockholders of appellant corporation at the time of the filing of the Bill. The presumptions favoring the validity of the license cast upon appellees the burden of pleading and proving facts which would render the license invalid. No such burden was met by a pleading that some months after the issuance of a license the plaintiff was then not qualified to receive it, and by a stipulation in which the only reference to the residence of the officers, directors, and stockholders of appellant corporation related to the time of the commencement of this action.

There is in this case, however, a broader and equally clear theory upon which appellant may properly be heard on the question of the constitutionality of this statute. If this Act is the only thing which prevents the appellant from continuing its business within the State of Pennsylvania, then if in the passage of the Act the State exceeded its powers, the appellant is certainly within the class of persons who may be heard upon this question.

Whether it had a license or not at the time this action was commenced would be wholly immaterial if the only provisions

of the Act relating to the issuance of a license were invalid. If the State had no power to exact a license upon the conditions imposed by this Act, it would be wholly immaterial whether the appellant possessed the qualifications which it would be required to have in the event the Act were valid. The appellant is not seeking a license, it is declaring that the provision for license is entirely void.

Irrespective of whether a state might limit the issuance of a license to one possessed of the qualifications enumerated in this statute, if the provisions of the statute which require the license are void because the State exceeded its power by discriminating against the products of another state, then it is no answer for the State to say, in this action brought by appellant engaged in the sale of the products discriminated against, that appellant does not possess the qualifications which the State might have required in connection with a valid license law. Can it be said that because appellant lacks a qualification exacted by an invalid law, it cannot complain of that law which purports to take away its right to engage in business?

If the licensing provisions of the Act insofar as they purport to classify distributors and require licenses for the privilege of engaging in the business of a distributor are invalid, and upon the same being so declared by this Court, the appellant could continue its business without further license or grant from the State, appellant's right to be heard upon the questions argued herein should be clear.

An examination of the provisions of this statute makes it manifest that all provisions of the Act relating to "distrib-

utor's" and "importing Distributor's" licenses are invalid if appellant's position in respect to the invalidity of the license fee exacted upon importing distributors is sustained.

The Court cannot rewrite a statute to incorporate what it might be assumed the legislature would have included had the invalid portion been omitted. Neither can it assume that with the invalid part omitted, the Legislature would have passed the Act, if remaining parts produce results obviously contrary to the object sought to be achieved by the legislative measure. This rule has been stated in the recent case of *Railroad Retirement Board* v. *Alton Railway Company*, 295 US 330, (361), where it was said:

> "The statute contains a section broadly declaring the intent that invalid provisions shall not operate to destroy the law as a whole. Such a declaration provides a rule which may aid in determining the legislative intent, but is not an inexorable command. Dorchy v. Kansas, 264 US 286, 68 L. ed. 686, 44 S. Ct. 323. It has the effect of reversing the presumption which would otherwise be indulged, of an intent that unless the act operates as an entirety it shall be wholly ineffective. Williams v. Standard Oil Co., 278 US 235, 242, 73 L. ed. 287, 309, 49 S. Ct. 115, 60 ALR 596; Utah Power & Light Co. v. Pfost, 286 US 165, 184, 76 L. ed. 1038, 1048, 52 S. ct. 548. But notwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole. Compare Hill v. Wallace, 259 US 44, 70, 66 L. ed. 822, 830, 42 S. Ct. 453. In this view we are confirmed by the petitioners' argument that as to some of the features

> we hold unenforceable, it is 'unthinkable' and 'impossible' that the Congress would have created the compulsory pension system without them. They so affect the dominant aim of the whole statute as to carry it down with them."

And, again, in *Hill* v. *Wallace*, 259 US 44, 70, it is said:

> "Section 11 (saving clause) did not intend the Court to dissect an unconstitutional measure and reframe a valid one out of it, by inserting limitations it does not contain."

Thus, in this case the provision fixing the fee to be paid for an "importing distributor's license" is as inseparably a part of the provisions of the Act requiring a license as the whole license system set up by the Act is inseparable from the Act itself. If the provision for the fee falls, the provision for the license itself must necessarily fall, for no one will contend, much less the State, that a person might secure the privilege purported to be conferred by an importing distributor's license without the payment of the fee, and yet be required to pay a fee to obtain the privilege purported to be conferred by a distributor's license. Therefore, if the provisions for an importing distributor's license fall, the provisions for a distributor's license are carried with it.

Thus, a holding that the license fee required for an importing distributor's license is invalid and nonenforcible removes from the Act the provisions for an importing distributor's license and for a distributor's license as well, both of which depend for their support upon the validity of the fee provisions.

This result leads to simply this: if appellant's position, that the state exceeded its powers in requiring a higher license fee of an importing wholesaler than of a wholesaler purchasing within the State, be sound, then no license whatever is required under the laws of Pennsylvania for appellant to engage in the business which it is conducting in the manner set forth in the Bill of Complaint and in the Stipulation of Facts, and such business being entirely lawful without any license, the threatened interference therewith, under the purported authority of said Act, entitles the appellant to the equitable relief prayed in its Bill.

III

The provisions of the Pennsylvania Act adopting arbitrary qualifications for licenses deny to appellant the guarantees of the XIV Amendment.

Appellant, as a separate attack upon the validity of the Pennsylvania "Beverage License Law" asserts that the provisions of the Act limiting the issuance of a license thereunder to a corporation whose officers, directors, and fifty-one per cent of whose stockholders are and have been for a period of two years prior to the making of such application residents of the State of Pennsylvania, are arbitrary, and without any reasonable relation to the purposes for which the police powers of the State may be properly exercised. The determination of the question already discussed has a bearing upon this branch of the argument only to the extent that a decision upon those questions in harmony with appellant's views will render unnecessary a consideration of this secondary question.

It may be here observed that the license fee which is required to be paid by an importing distributor is not the measure of the jurisdictional amount in controversy in this case. By no mere payment of a license fee may the appellant be privileged to continue its business of purchasing and importing beer manufactured outside the state. This Act purports to exclude appellant from the class of persons qualified to receive an importing distributor's license.

Section 5-b of the Act provides as follows:

> "Such license shall be issued to corporations duly organized or registered under the laws of the Commonwealth of Pennsylvania only when it appears that all the officers and directors of the corporation are citizens of the United States and have been residents of the Commonwealth of Pennsylvania for a period of at least two years prior to the date of the application, and that at least 51% of the capital stock of said corporation is actually owned by citizens who are residents of the United States and have been residents of the Commonwealth of Pennsylvania for a period of at least two years prior to the date of such application."

Thus, though, under the stipulated facts, appellant is possessed of all the privileges of a "distributor", yet, under the provisions of 32 (b) and Regulation 51, such privileges do not include the purchase and importation of beer manufactured outside the state.

Appellant, being presently unable to qualify for an "importing distributor's" license, asserts the invalidity of such provision on the ground that the requirement bears no reason-

able relation to the exercise of the police powers of the state in the curbing of any evils that might justify resort to such power, and that in this respect it constitutes an arbitrary invasion of appellant's property rights guaranteed by the Constitution.

It must be borne in mind that the type of license for which such qualifications are prescribed is one authorizing only the dealing at wholesale in malt and brewed liquors. It does not involve the licensing of a business in which the evils arising from retail sales and trade may exist. It is granted that if any reasonable relation might be found to exist between the condition imposed and the morals of the state, for the preservation of which the police power may be exercised, the Court will not find it invalid because of its questioned wisdom or because some other measure might have been adopted more reasonably calculated to secure the desired result. If, however, the condition is wholly arbitrary, having no conceivable relation to the public health and morals, then it does violate the constitutional right of appellant.

The equal protection clause extends to foreign corporations within the jurisdiction of the state and safeguards the protection of the law equally to all in the same situation. The appellant is entitled to the same protection of equal laws in the conduct of its business in the State of Pennsylvania as a natural person within its jurisdiction has a right to demand under like circumstances.

Kentucky Finance Corp. v. *Paramount Auto Exch.*, 262 US 544;
Quaker City Cab Co. v. *Pennsylvania*, 277 US 389;
Adair v. *United States*, 208 US 161;
Mugler v. *Kansas*, 123 US 623.

Examining the provisions of the Pennsylvania Act for the purpose of determining whether the qualification required of the stockholders of a corporation, as prerequisite to the corporation obtaining a license, is a valid exercise of the police power, or a denial of the appellant's rights under the guise of a police regulation, we find:

1. That the state is assured compliance with the law (a) by the licensee's posting of a bond (§18); (b) by the execution of a warrant of attorney authorizing the confession of judgment on behalf of such licensee in an action brought upon such bond. (§18)

2. The statute provides by numerous restrictions and limitations for the conduct of the business of the licensee, and makes penal the violation of such provisions by any officer, director, servant, agent, or employee of the corporation holding the license, making no reference however to stockholders, and imposing no duties or penalties upon any stockholder of such corporation.

The following provisions of § 23 of the Act show the strict regulation to which a corporation holding a distributor's or importing distributor's license is subject. The following acts are expressly prohibited:

(a) To sell beer between the hours of 12:00 o'clock midnight of any Saturday and 2:00 A. M. of the following Monday.

(c) To sell or give beer to any intoxicated person, a minor, or a habitual drunkard.

(e) To sell, purchase, or receive malt beverages, except for cash, except as provided for credit upon

the return of containers, and for the usual commercial credit.

(f) To sell beverages on a pass book.

(g, h, i, and k) To sell, advertise, or label malt or brewed beverages in violation of the rigorous restrictions.

(m) To engage in any other business upon the licensed premises.

(n) To store other than malt beverages upon the premises.

(p) To advertise with respect to alcoholic strength.

(q) To give money, or anything of value, to employees of prospective purchaser to induce sales.

(r) To give any prize to induce sales.

(s) To make any rebates to induce purchases.

(t) The failure to keep full and complete records concerning the operations of the licensee and all its activities, and grant access thereto by the Board.

(z) To transport or import in violation of any regulation of the Board.

By these provisions of the Act, every act which might be deemed offensive to the morals of the state is restricted or prohibited, and without a violation of the law the business of the licensee could not be conducted in a manner violative of the policy of the state as declared in the statute. What possible relation can be conceived to exist between the curbing of evils arising from the use of intoxicants and the requirements as to residence of the stockholders of a corporation upon whom no duty is placed under the Act, who have no active charge or control of the business, and whose identity it may be assumed as a matter of public knowledge is in a state of constant flux.

Legislation of this type is not novel with this Court. A statute enacted by the same state purporting to prohibit the ownership of any pharmacy or drug store by a corporation whose stockholders were not all registered pharmacists was held invalid as an arbitrary interference with the private business of a corporation operating a chain of drug stores. It was said in *Liggett Co.* v. *Baldrige*, 278 US 105, 112-14:

> "It, therefore, will be seen that without violating laws, the validity of which is conceded, the owner of a drug store, whether a registered pharmacist or not, cannot purchase or dispense impure or inferior medicines; he cannot, unless he be a licensed physician, prescribe for the sick; he cannot, unless he be a registered pharmacist, have charge of a drug store or compound a prescription. Thus, it would seem, every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded.
>
> "The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with ownership. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. (Citing cases)
>
> "In the light of the various requirements of the Pennsylvania statutes, it is made clear, it it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an un-

reasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance, This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the 14th Amendment."

Everything that was argued as tending to invalidate the statutes before the Court in the foregoing case, and everything that was said by this Court in holding the Act utterly unsustainable, has equal application to the Act now before this Court on this review. This qualification obviously has no relation to the purposes for which the police power may be exercised, and was inserted in the statute simply as a part of the same plan that is manifest in the requirement of the higher license fees for those engaged in the business of purchasing the malt beverages from manufacturers outside the state.

IV

Views of the Trial Court

The trial court, although conceding the discriminatory effect of the statute in imposing higher license fees and burdens upon one engaged in the purchase of intoxicating liquors from manufacturers and dealers outside the State of Pennsylvania than is imposed upon one engaged in the purchase of malt beverages from manufacturers or dealers within the State, nevertheless held the Act valid upon the theory as expressed in the following language:

> "The other modified forms of prohibition we call regulation of the traffic. Importation, on the other hand, is an act. The test of its legality is by the Webb-Kenyon Act and by the Twenty-First Amendment made the law of the importing state. It might have made the test that applied by the Reed Bill—the law of a prohibition state. It was, however, made otherwise,—whether the import would be in violation of any law of the state of importation. This test is a constitutional provision. Such provisions, if conflicting, are subject to the rule applied to conflicting statutes. The latest controls. The provisions of the original Constitution, as of the earlier amendments, must give way to the later."

With some elaboration in the opinion, the foregoing is the very heart of the decision resulting in the dismissal of plaintiff's bill. If the conclusion so expressed is unsound under the decisions of this court, then the appellant is entitled to the relief prayed in its Bill. That such views cannot be sustained upon authority or reason would appear manifest from

what has preceded in this argument. The trial court by adopting the unsound principle that the Webb-Kenyon Act and the 21st Amendment made unlawful the shipment of liquors in violation of any Act of the legislature of the state lost sight of the principle announced in *Baldwin* v. *Seelig*, 294 US 511, that

> "neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the commerce of its residents."

Of the four cases presented to three-judge courts since the passage of the 21st amendment, only the trial court in this case has held that a state is permitted to enact discriminatory legislation against liquors manufactured or produced outside its borders. The reasoning of the courts whose views the lower court in this case expressly refused to follow, should commend to this court the conclusion of those decisions.

V

In Conclusion

In conclusion appellant submits that neither the 21st Amendment nor the Webb-Kenyon Act which are advanced by the state to sustain its legislation authorizes a state to impose discriminatory burdens or taxes upon products solely because of the out-of-state origin of such products, and that the pro-

visions of the Beverage License Law of the State of Pennsylvania which thus unfairly discriminate are unconstitutional and void.

Respectfully Submitted,

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APPENDIX

Portions of

Pennsylvania Beverage License Law Of 1935

material to the questions on this appeal:

An Act

To regulate and restrain the traffic in malt and brewed beverages, as herein defined; providing for the licensing of the manufacture, transportation, sale and distribution of such beverages; imposing license and permit fees, and providing for collection and distribution thereof; restricting ownership and interest in licensed places; permitting municipalities and townships, by vote of the electors, to prevent the licensing therein of places where such beverages may be sold for consumption on the premises, and regulating elections for this purpose; imposing duties upon county treasurers, the Pennsylvania Liquor Control Board, quarter sessions courts, district attorneys, the Department of Justice, proper authorities of political subdivisions of the State, and election officers; providing penalties; and repealing existing acts.

Section 1. Short Title. This act shall be known, and may be cited, as the "Beverage License Law."

Section 2. Definitions. The following words and terms, as used in this act, shall be construed as defined in this section:

(a) The term "malt or brewed beverage" means any beer, lager beer, ale, porter, or similar fermented malt liquor, containing one-half of one per centum or more of alcohol by volume, by whatever name such liquors may be called.

(b) The word "person" means and includes natural persons, associations, partnership and corporations.

(c) The word "manufacturer" means and includes all persons holding licenses issued by the board to engage in the manufacture, bottling, transportation, and sale of malt or brewed beverages.

(d) The term "distributor" means and includes persons licensed by the board to engage in the purchase, only from Pennsylvania manufacturers and from importing distributors, and the resale of malt or brewed beverages in the original sealed packages, as prepared for the market by the manufacturer, but not for consumption on the premises where sold, and in quantities of not less than two hundred eighty-eight fluid ounces.

(e) The term "importing distributors" means and includes persons licensed by the board to engage in the purchase from manufacturers and other persons located outside this Commonwealth, and from persons licensed as manufacturers and distributors under this act, and the resale of malt or brewed beverages in the original sealed packages as prepared for the market by the manufacturer, but not for consumption on the premises where sold, and in quantities of not less than two hundred eighty-eight fluid ounces.

(f) The term "retailer" means and includes persons licensed by the treasurer to engage in the retail sale of malt or brewed beverages, classified and defined as follows:

"Retail Dispenser" means and includes persons licensed to engage in the retail sale of malt or brewed beverages for consumption on the premises of such licensee, with the privilege of selling malt or brewed beverages in quantities not in excess of seventy-two fluid ounces in a single sale to one person, to be carried from the premises by the purchaser thereof.

(g) The term "original containers" means and includes bottles, casks, kegs or other suitable containers that have been securely capped, sealed or corked by the manufacturr, with the name and address of the manufacturer permanently affixed to the bottle, cask, keg, or other container, or to the cap or cork used in sealing same, or to a label securely affixed to a bottle.

(h) The term "license" means and includes both the person making the application therefor and the premises upon which the privileges of the license are to be exercised, and includes licenses issued under the provisions of this act.

(i) "Eating place" means a premise having a total area of not less than three hundred square feet, available to the public in one or more rooms other than living quarters, and equipped with tables and chairs accommodating thirty persons at one time.

(j) "Treasurer" means the county treasurer of the county in which is located any place specified in an application as the place for which a license is desired.

(k) "Board" means the Pennsylvania Liquor Control Board of this Commonwealth.

(l) As used in this act, the singular shall include the plural, and the masculine gender shall include the feminine and neuter.

(m) The term "manufacturer" shall mean and include all means, methods, and processes used, employed and made use of, to produce, make and manufacture for commercial purposes, malt or brewed beverages from raw materials.

(n) "Hotel" shall mean any reputable establishment operated by responsible persons of good reputation where the public may, for a consideration, obtain sleeping accommodations and meals and which, in a city, has at least eight, and, in any other place, at least four permanent bedrooms for the use of guests, and a public dining room or eating place operated by the same management having a total area, in one or more rooms, of not less than three hundred square feet, and accomodating at least thirty persons at one time.

Section 5. The manufacturers' Distributors', and Importing Distributors' Licenses.

(a) It shall be unlawful for any person to manufacture malt or brewed beverages, unless such person holds a valid manufacturer's license issued by the board. The board shall issue to any person, a resident of this Commonwealth of good repute who applies therefor, pays the license fee hereinafter prescribed, and files the bond hereinafter required, a manufacturer's license to produce and manufacturer malt or brewed beverages, and to transport, sell and deliver malt or brewed beverages at or from one or more places of manufacture or storage only in original packages in quantities of not less than two hundred eighty-eight fluid ounces, anywhere within the Commonwealth. Each individual applicant for a manufacturer's license and, in the case of partnerships and associations, each member thereof shall be a citizen of the United States and have been residents of this Commonwealth at least two years prior to the date of their respective applications. In the case of corporations organized or registered under the laws of this Commonwealth, it must appear that all of the officers and directors and the owners of, at least, fifty-one per centum of

the capital stock of the corporation are citizens of the United States and have, for a period of at least two years prior to the date of application, been residents of this Commonwealth. Licenses for places of storage shall be limited to those maintained by manufacturers at the effective date of this act, and thereafter the board shall issue no licenses for places of storage in addition to those maintained at the effective date of this act. The application for such license shall be in such form and contain such information as the board shall require. All such licenses shall be granted for the calendar year, and where a license runs for less than the full calendar year, the license fee shall be reduced one-twelfth for each full month such license was not in force during the calendar year. Every manufacturer shall keep, at his or its principal place of business within the Commonwealth, daily permanent records which shall show (a) the quantities of raw materials received and used in the manufacture of malt or brewed beverages, and the quantities of malt or brewed beverages manufactured and stored, (b) the sales of malt or brewed beverages, (c) the quantities of malt or brewed beverages stored for hire or transported for hire by or for the licensee, and (d) the names and addesses of the purchasers or other recipients thereof. Every place licensed as a manufacturer shall be subject to inspection by members of the board or by persons duly authorized and designated by the board, at any and all times of the day or night as they may deem necessary (a) for the detection of violations of this act or of the rules and regulations of the board, or (b) for the purpose of ascertaining the correctness of the records required to be kept by licensees. The books and records of such licensees shall, at all times, be open to inspection by members of the board or by persons duly authorized and designated by the board. Members of the board and its duly authorized

agents shall have the right, without hindrance, to enter any place which is subject to inspection hereunder, or any place where such records are kept, for the purpose of making such inspections and making transcripts thereof.

(b) The board shall issue to any reputable person who applies therefor, pays the license fee hereinafter prescribed, and files the bond hereinafter required, a distributor's or importing distributor's license for the place which such person desires to maintain for the sale of malt or brewed beverages, not for consumption on the premises where sold and in quantities of not less than two hundred eighty-eight fluid ounces and in original packages as prepared for the market by the manufacturer. Such licenses shall be issued only to reputable individuals, partnerships and associations who are, or whose members are, citizens of the United States and have for two years, prior to the date of their applications, been residents of the Commonwealth of Pennsylvania, or to reputable corporations organized or duly registered under the laws of the Commonwealth of Pennsylvania. Such licenses shall be issued to corporations duly organized or registered under the laws of the Commonwealth of Pennsylvania only when it appears that all of the officers and directors of the corporation are citizens of the United States, and have been residents of the Commonwealth of Pennsylvania for a period of at least two years prior to the date of application, and that, at least, fifty-one per centum of the capital stock of such corporation is actually owned by individuals who are citizens of the United States and have been residents of the Commonwealth of Pennsylvania for a period of at least two years prior to the date of application. Such license shall authorize the holder thereof to sell or deliver malt or brewed beverages in quantities of not less than two hundred eighty-

eight fluid ounces anywhere within the Commonwealth of Pennsylvania which, in the case of distributors, have been purchased only from persons licensed under this act and, in the case of importing distributors, have been purchased from manufacturers and persons outside this Commonwealth or from persons licensed under this act.

Section 10. Filing of Applications for Distributors', Importing Distributors' and Retailers' Licenses.—Every person intending to apply for distributor's, importing distributor's or retail dispenser license as aforesaid, in any municipality or township of this Commonwealth, shall file, with the board or treasurer, as the case may be, his or its application. In the case of distributors and importing distributors applications shall be filed at a time to be fixed by the board for the particular license district as set up by the board, under the provisions of the Pennsylvania Liquor Control Act. The applicant shall at the time of filing the application pay said board or treasurer as the case may be, the filing fee of ten dollars as specified in this act.

Section 11. Application for Distributors', Importing Distributors, and Retailers' Licenses.—Application for distributors', importing distributors' and retailers' licenses shall contain the following information and statements—

(a) The name and residence of the applicant, and how long he has resided there; and if an association, partnership or corporation the residences of the members, officers and directors, for the period of two years next preceding the date of such application;

(b) The particular place for which the license is desired, and a detailed description thereof;

(c) Place of birth of applicant, and if a naturalized citizen where and when naturalized; and if a corporation organ-

ized or registered under the laws of the Commonwealth, when and where incorporated, with the names and addresses of each officer and director; if the application is for a distributor's, importing distributor's license and the applicant therefor is a corporation, the application shall also contain a statement that all of the officers and directors are citizens of the United States, and have been residents of the Commonwealth of Pennsylvania for a period of at least two years prior to the date of application, and the further statement that at least fifty-one per centum of the capital stock of the corporation is actually owned by individuals who are citizens of the United States and who have been residents of the Commonwealth of Pennsylvania for a period of at least two years prior to the date of application, together with the names and addresses of all stockholders;

(d) Name of owner of premises, and his residence;

(e) That the applicant is not, or in case of a partnership or association that the members or partners are not, and in the case of a corporation that the officers and directors are not, in any manner pecuniarily interested, either directly or indirectly, in the profits of any other class of business regulated under this act, except as hereinafter permitted;

(f) That applicant is the only person in any manner pecuniarily interested in the business so asked to be licensed, and that no other person shall be in any manner pecuniarily interested therein during the continuance of the license, except as hereinafter permitted.

(g) Whether applicant, or in case of a partnership or association any member or partner thereof, or in case of a coporation any officer or director thereof, has, during the three years immediately preceding the date of said application, had a license for the sale of malt or brewed beverages or spirituous

and vinous liquors revoked, or has, during the same period, been convicted of any criminal offense, and, if so, a detailed history thereof;

(h) A full description of that portion of the premises for which license is asked, and, if any other business is to be conducted concurrently with the sale and distribution of malt or brewed beverages, a full history of such business, relating the nature thereof, the length of time it has so previously been conducted by the applicant, or his predecessor, at such location;

(i) Every club applicant shall file, with and as a part of its application, a list of the names and addresses of its members, directors, officers, agents and employes, together wth the dates of their admission, election or employment, and such other information with respect to its affairs as the board shall require. The treasurer shall refuse to issue licenses to clubs when it appears that the operation of the club license would inure to the benefit of individual members, officers, agents or employes of the club rather than to the benefit of the entire membership of the club.

There shall be annexed to such application a certificate, signed by at least twelve reputable qualified electors of the ward, borough or township in which such malt or brewed beverages are to be sold, setting forth that they have been acquainted with the applicant or applicants, or the members of the association or partnership, or the directors and officers of the corporation where the applicant is a corporation, that they have good reason to believe that each and all the statements contained in the petition are true, and they therefore believe that the application should be granted and that the license should issue.

The application must be verified by affidavit of applicant, and if any false statement is intentionally made in any part of

the application, the affiant shall be deemed guilty of the crime of perjury. A license shall not be granted by the board or treasurer, as the case may be, unless the application contains the information herein required, and the premises meet such reasonable sanitary requirements as the board by regulation shall prescribe.

Section 12. Prohibitions against the Grant of Licenses.—(a) Any retailer dispenser may be granted licenses to maintain, operate or conduct any number of places for the sale of malt or brewed beverages, but a separate license must be secured for each place where malt or brewed beverages are sold.

(b) No person shall possess or be issued more than one distributor's, importing distributor's license; no person shall possess or be issued more than one class of license. No distributor or importing distributor shall maintain or operate any place where sales are made other than that for which the license is granted. No distributor or importing distributor shall maintain any place for the storage of malt or brewed beverages unless the same has been approved by the board. No distributor's or importing distributor's license shall be issued for any premises in any part of which there is operated any retail license for the sale of liquor or malt or brewed beverages.

(c) Licenses shall be granted by the board or treasurer only to reputable individuals, or to associations, partnerships and corporations whose members or officers and directors are reputable individuals.

A retail dispenser license shall not be issued to any individual unless such individual, for one year immediately preceding the date of his application, has been a resident of the county wherein his place of business is or is to be located.

Section 13. Revocation and Suspension of Licenses.—

(a) After a license has been granted by the treasurer, upon petition of the Attorney General, the board, the treasurer, the district attorney, or fifteen or more taxpayers, residents of the ward, borough or township where the place of business is located, to the court of quarter sessions, and upon sufficient cause being shown or proof being made to the court that licensee holding a license, or any partners, members, officers or directors of the licensee, has or have violated any of the laws of this Commonwealth relating to the sale of malt or brewed beverages, or relating to the manufacture, sale or transportation of alcohol or other alcoholic beverages, it may, upon due notice and proper hearing being given to the person so licensed, suspend or revoke the said retail license issued by the treasurer. The court shall assess or remit the costs in its discretion.

Any licensee whose retail license is revoked shall be ineligible to have a license or permit under this act, or under another act relating to the manufacture, sale or distribution of malt liquor or other alcoholic liquors, until the expiration of three years from the date his license was revoked.

(b) The board upon sufficient cause being shown or proof being made that any licensee holding a license issued by the board, or any partners, members, officers or directors of the licensee has or have violated any of the laws of this Commonwealth relating to the manufacture, sale, possession or transportation of malt or brewed beverages, alcohol or other alcoholic beverages may, upon due notice and proper hearing being given to the person so licensed, suspend or revoke the license issued by the board under the provisions of this act. In all cases where the board shall suspend or revoke a license, it shall set forth its finding of fact, the evidence from which such findings of fact are made, and the reasons upon which its action is based. Any licensee whose license is revoked by

the board shall be ineligible to have a license under this act or under any other act of the Commonwealth of Pennsylvania relating to the manufacture, transportation or sale of liquor or malt or brewed beverages until the expiration of three years from the date such license was revoked. In the event the board shall revoke a license, no license shall be granted for the premises in which the said license was conducted for a period of at least one year after the date of the revocation of the license conducted in the said premises. Any person aggrieved by the suspension or revocation of a license issued by the board under this act may, within twenty days after such suspension or revocation, appeal to the court of quarter sessions of the county in which the premises in which said license was conducted are located. Such appeal shall be upon the petition of the person aggrieved who shall serve a copy thereof upon the board, whereupon a hearing shall be held upon the petition by by the court after ten days notice to the board which shall be represented in the proceedings by the Department of Justice. At such hearing, testimony may be presented by the applicant and the board, after the consideration of which the court shall either sustain the suspension or revocation of the license, modify or reverse the order of the board. In all such cases of appeal, the court of quarter sessions shall file of record at least a brief statement in the form of an opinion of the reasons for the ruling or order.

(c) Any person aggrieved by the action of the court of quarter sessions shall have the right to appeal to the Superior Court. The Superior Court shall examine the record upon which such appeal is based and shall determine whether or not the action of the court of quarter sessions was properly based upon the evidence presented to it. The action of the Superior Court shall be final.

Section 18. All Licensees to Furnish Bond.—No license shall be issued to any manufacturer, distributor, importing distributor, or retailer, or to any railroad, pullman or steamship company, until the licensee shall have first executed a bond to the Commonwealth of Pennsylvania, and a warrant of attorney to confess judgment, in the penal sum hereinafter prescribed. Bonds of all applicants except manufacturer's shall have sufficient sureties, either personal or a surety company authorized to do business in this Commonwealth. Bonds with personal surety shall be executed by not less nor more than two individuals as sureties, each of whom shall own real estate of an assessed valuation over and above all encumbrances and outstanding liabilities of two thousand dollars ($2000) or more. Bonds of manufacturers shall have as surety a surety company authorized to do business in this Commonwealth. Such bonds shall not be accepted until approved by the board or treasurer, as the case may be. All such bonds shall be conditioned for the faithful observance of all the laws of this Commonwealth relating to the manufacture, sale, possession or transportation of malt or brewed beverages or alcohol or any other alcoholic beverages. All bonds shall be filed with and retained by the board or treasurer, as the case may be. The penal sum of bonds filed by the manufacturers shall be ten thousand ($10,000.00) dollars for each place at which the licensee is authorized to manufacture. The penal sum of bonds filed by distributors shall be one thousand ($1,000.00) dollars and for importing distributors two thousand ($2,000.00) dollars. The penal sum of bonds filed by all other licensees shall be one thousand ($1,000.00) dollars for each place at which the licensee is authorized to sell malt or brewed beverages except that in case of railroad, pullman or steamship companies the penal sum of the bond to be filed shall be one thousand ($1,000.00)

dollars irrespective of the number of licensed cars or ships operated by such companies. Every such bond may be forfeited when a license is revoked and shall be turned over to the district attorney, or the Attorney General, as the case may be, to be sued out for collection, if, and when, the licensee's license shall have been revoked and his bond forfeited as herein provided.

Section 19. License Fees; Distribution of Revenues.—No license shall be issued to any manufacturer, distributor, importing distributor or retail dispenser until the licensee shall have first paid an annual license fee for such grant, as follows:

(a) In the case of a manufacturer, the license fee shall be one thousand ($1,000.00) dollars for each place of manufacture, and shall be paid to the board.

(b) In the case of a distributor, the license fee shall be four hundred ($400.00) dollars, and shall be paid to the board.

(c) In the case of an importing distributor, the license fee shall be nine hundred dollars ($900.00), and shall be paid to the board.

(d) In the case of a retail dispenser, the license fee shall be graduated according to the population of the municipal unit or township in which the place of business is located, and shall be paid to the treasurer as follows:

	Retail Dispenser
(a) Less than 10,000	$100
(b) 10,000 and more, but less than 50,000	150
(c) 50,000 and more, but less than 100,000	200
(d) 100,000 and more, but less than 150,000	250
(e) 150,000 and more	300

(d) In the case of an incorporated club, the fee shall be twenty-five dollars in all cases, and shall be paid to the treasurer.

(e) In the case of a public service license for cars, the fee shall be ten dollars per car for the maximum number of cars operated on any one day on which malt or brewed beverages are sold, to be paid to the board.

(f) In the case of a public service license for the sale of malt or brewed beverages on a boat or vessel, the fee shall be fifty dollars for each such vessel or boat, and shall be paid to the board.

(g) The fee for filing applications for licenses and for renewals shall be ten dollars which, together with fees for transfers, shall be paid to the board or treasurer issuing the licenses.

(h) The license fees fixed by this section shall be paid before the license or renewal is issued.

(i) The license fees for manufacturers, distributors, importing distributors and public service licenses, and all filing fees for such licenses and all permit fees shall be transmitted to the State Treasurer by the board, and shall be paid into the State Stores Fund. Fees paid for retail dispensers licenses shall be paid by the treasurer to the municipalities and townships in which the licensed places are located. Filing fees collected by the treasurer shall be for the use of the county.

Section 23. Unlawful Acts.—It shall be unlawful

(a) For any manufacturer, importing distributor, or distributor or the servants, agents or employes of the same to sell trade or barter in malt or brewed beverages between the hours of twelve o'clock midnight of any Saturday and two o'clock in the forenoon of the following Monday.

(b) For any hotel, restaurant or public service licensee or the servants, agents or employes of such licensees to sell, trade or barter in beverages between the hours of twelve o'clock midnight of any Saturday and seven o'clock in the forenoon

of the following Monday, or between the hours of two o'clock antemeridian and seven o'clock antemeridian of any day.

(c) For any licensee to sell, furnish or give any beverages to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known intemperate habits.

(d) For any hotel, restaurant or public service licensee to sell, furnish or give any malt or brewed beverages to any person until one hour after the time fixed by law for the closing of polling places on days on which a general, municipal, special or primary election is being held.

(e) For any licensee to sell, or offer to sell, or purchase or receive, any malt or brewed beverages except for cash, excepting credits extended by a hotel or club to bona fide registered guests or members. No right of action shall exist to collect any claims for credit extended contrary to the provisions of this clause. Nothing herein contained shall prohibit a licensee from crediting to a purchaser the actual price charged for packages or containers returned by the original purchaser as a credit on any sale, or from refunding to any purchaser the amount paid by such purchaser for containers, or as a deposit on containers when title is retained by the vendor if such containers or packages have been returned to the manufacturer, distributor, importing distributor or other vendor. Nothing herein contained shall prohibit a manufacturer from extending usual and customary credit for malt or brewed beverages sold to customers or purchasers who live or maintain places of business outside of the Commonwealth of Pennsylvania, when the beverages so sold are actually transported and delivered to points outside of the Commonwealth.

(f) For any licensee to sell, offer to sell, or furnish any beverage to any person on a pass book or store order, or to

receive from any person any goods, wares, merchandise or other articles except containers returned in exchange for malt or brewed beverages.

(g) For any licensee, except a manufacturer on his own premises, to advertise on the outside of any licensed premises, or on any lot of ground on which licensed premises are situate. or on any building of which the licensed premises are a part, any beverages by trade name, trade-mark, or in any manner which would indicate the manufacturer, producer or place of manufacture or production of any beverage, unless the actual value of such advertising device shall be not more than seventy-five dollars ($75.00).

(h) For any manufacturer, importing distributor or distributor to give, furnish or sell, or for any other licensee to lease, purchase or receive for display or to display on the inside of any licensed premises any advertising matter indicating the trade-mark or trade name of any particular beverage or the manufacturer, producer or place of manufacture or production of any beverage unless the actual value of such advertising device shall not exceed twenty-five dollars.

(i) For any licensee to advertise, or hold out for sale, any malt or brewed beverage by trade name or other designation which would indicate the manufacturer or place of production of the said beverage, unless he shall actually have on hand and for sale a sufficient quantity of the particular beverage so advertised to meet requirements to be normally expected as a result of such advertisement or offer.

(j) For any retail dispenser to furnish or serve any malt or brewed beverages from any faucet, spigot or other dispensing apparatus, unless the trade name or brand of the product served shall appear in full sight of the customer and in legible lettering upon such faucet, spigot or dispensing appartus.

(k) For any licensee or his or its servants, agents or employes to transport, sell, deliver or purchase any malt or brewed beverage upon which there shall appear a label or other informative data which, in any manner, refers to the alcoholic contents of the malt or brewed beverage or which refers, in any manner, to the original alcoholic strength, extract or balling proof from which such beverage was produced. This clause shall not be construed to prohibit a manufacturer from designating, upon the label or descriptive data, the alcoholic contents of malt or brewed beverages intended for shipment into another state or territory when the laws of such state or territory require that the alcoholic content of the malt or brewed beverage must be stated upon the package.

(l) For any retail licensees, except clubs, to permit in any licensed premises, dancing, theatricals, floor show or moving picture exhibitions of any sort, unless the licensee shall have first received from the board a special permit to provide such entertainment, or for any retail licensee under any circumstances to permit in any licensed permises, any lewed, immoral or improper entertainment regardless of whether or not a permit to provide entertainment has been obtained. The board shall have power to provide for the issue of such special permits and to require a fee of twenty-five dollars for permits authorizing theatricals, floor shows or moving picture exhibitions. All such fees shall be paid into the State Stores Fund.

(m) For any "distributor" or importing distributor, without the approval of the board, to engage on the licensed premises in any other business whatsover except the business of distributing malt or brewed beverages or non-intoxicating beverages.

(n) For any distributor, importing distributor, retailer to have in his possession on any licensed premises, or to permit

the storage on the licensed premises, of any spirituous, vinous or alcoholic liquors or alcohol of any sort except malt or brewed beverages.

(o) For any licensee to manufacture, import, sell, trade or barter in any spirituous, vinous or other alcoholic liquors or alcohol except malt or brewed beverages.

(p) For any licensee to issue, publish or post or cause to be issued, published or posted any advertisement of a malt or brewed beverage including a label which shall refer in any manner to the alcoholic strength of the malt or brewed beverages manufactured, sold or distributed by such licensees, or to use in any advertisement or label such words as "full strength," "extra strength," "high test," "high proof," "pre-war strength," or similar words or phrases which would lead or induce a consumer to purchase a brand of malt or brewed beverage on the basis of its alcoholic content, or to use in or on any advertisement or label any numeral unless adequately explained in type of the same size prominence and color, or for any licensee to purchase, transport, sell or distribute any malt or brewed beverage advertised or labled contrary to the provisions of this clause.

(q) For any licensee or any agent, employe or representative of any licensee to give or permit to be given, directly or indirectly, money or anything of substantial value in an effort to induce agents, employes or representatives of customers or prospective customers to influence their employers or principals to purchase or contract to purchase malt or brewed beverages from the donor of such gift or to influence such employers or principals to refrain from dealing or contracting to deal with other licensees.

(r) For any licensee to offer or give any prize, premium, gift or other similar inducement to either trade or consumer

buyers except advertising novelties of nominal value which the board shall define.

(s) For any licensee to offer, pay, make or allow, or for any licensee to solicit or receive, any allowance or rebate, refunds or concessions whether in the form of money or otherwise to induce the purchase of malt or brewed beverages manufactured or sold by the licensee.

(t) For any licensee to fail to keep, for a period of at least two years, complete and truthful records covering the operation of his license and particularly showing the date of all purchases of malt or brewed beverages, the actual price paid therefor and the name of the vendor, or to refuse the board or an authorized employe of the board access thereto or the opportunity to make copies of the same when the request is made during business hours.

(u) For any licensee to refuse the board, or any of its authorized employes, the right to completely inspect the entire licensed premises at any time during which the premises are open for the transaction of business.

(v) For any retail dispenser to furnish, give, or sell below a fair cost any lunch to any consumer except such articles of food as the board may authorize and approve.

(w) For any person to hawk or peddle malt or brewed beverages or to distribute malt or brewed beverages unless an order therefor has been previously received.

(x) For any licensee to be, directly or indirectly, employed by any other licensee engaged in the manufacture, storage, transportation or sale of spirituous or vinous liquors, alcohol or malt or brewed beverages.

(y) For any licensee to knowingly sell any malt or brewed beverages to any person engaged in the business of illegally selling liquor or malt or brewed beverages.

(z) For any person to transport or import any malt or brewed beverages into this Commonwealth, except in accordance with the rules and regulations of the board, or for any person to transport malt or brewed beverages into or within this Commonwealth unless there shall be affixed to the original containers in which such malt or brewed beverages are transported stamps or crowns evidencing the payment of the malt liquor tax to the Commonwealth: Provided, however, That this clause shall not be construed to prohibit transportation of malt or brewed beverages through this Commonwealth and not for delivery therein if such transporting is done in accordance with the rules and regulations of the board.

Section 28. Interlocking Business Prohibited.—(a) No manufacturer, and no officer or director of any manufacturer, shall, at the same time, be a distributor, importing distributor or retail dispenser, or an officer, director or stockholder or creditor of any distributor, importing distributor or retail dispenser, nor, except as hereinafter provided, be the owner, proprietor or lessor of any place covered, directly or indirectly, by any distributor's, importing distributor's malt or brewed beverage or liquor license.

(b) No distributor or importing distributor, and no officer or director of any distributor or importing distributor, shall, at the same time, be a manufacturer or retailer, or be an officer, director, stockholder or creditor of a manufacturer or retailer, or be the owner, proprietor or lessor of any place covered by any other malt or brewed beverage or liquor license.

(c) No licensee licensed under this act, shall directly or indirectly own any stock of, or have any financial interest in, any other class of business licensed under this act.

(d) Excepting as hereinafter provided, no manufacturer, importing distributor or distributor shall in any wise be inter-

ested, either directly or indirectly, in the ownership or leasehold of any property, or in any mortgage against the same for which a liquor or retail dispensers license is granted; nor shall a manufacturer, importing distributor or distributor, either directly or indirectly, lend any moneys, credit, or equivalent thereof to any retailer in equipping, fitting out, or maintaining and conducting, either in whole or in part, an establishment or business operated under a liquor or retail dispenser's license excepting only the usual and customary credits allowed for returning packages or containers in which malt or brewed beverages were packaged for market by the manufacturer.

(e) Excepting as hereinafter provided, no manufacturer shall in any wise be interested, either directly or indircetly, in the ownership or leasehold of any property, or any mortgage lien against the same, for which a distributor's or importing distributor's license is granted; nor shall a manufacturer, either directly or indirectly, lend any moneys, credit, or their equivalent to any distributor or importing distributor in equipping, fitting out, or maintaining and conducting, either in whole or in part, an establishment or business where malt or brewed beverages are licensed for sale by a distributor or importing distributor, excepting only the usual credits allowed for the return of packages or containers in which malt or brewed beverages were originally packaged for the market by the manufacturer.

(f) No distributor, importing distributor or retail dispenser shall, in anywise, receive, either directly or indirectly, any credit, loan, moneys, or the equivalent thereof from any other licensee, or from any officer, director or firm member of other licensee, or from or through a subsidiary or affiliate of another licensee or from any firm, association or corporation, except banking institution, in which another licensee or any officer,

director or firm member of another licensee has a substantial interest or exercises a control of its business policy for equiping, fitting out, payment of license fee, maintaining and conducting, either in whole or in part, an establishment or business operated under a distributor's, importing distributor's or retail dispensers license excepting only the usual and customary credits allowed for the return of packages or containers in which malt or brewed beverages were packed for the market by the manufacturer.

The purpose of this section is to require a separation of the financial and business interests between the various classes of business regulated by this act, and no person or corporation shall by any device whatsoever, directly or indirectly, evade the provisions of this section. But in view of existing economic conditions, nothing contained in this section shall be construed to prohibit the ownership of property or conflicting interest by a manufacturer of any place occupied by a distributor, importing distributor or retail dispenser after the manufacturer has continuously owned and had a conflicting interest in such place for a period of at least five years prior to the effective date of this act.

The term "manufacturer", as used in this section, shall include manufacturers as defined in this act, and any person manufacturing any malt or brewed beverages outside of this Commonwealth.

Section 32B. (b) All licenses issued to distributors for the license year beginning June first, one thousand nine hundred and thirty-five, prior to the effective date of this act and which remain unrevoked on that date, shall be in force, subject to adjustment, as hereinafter provided, for such period of a whole license year as the amount of license fee paid to the county treasurer bears to the amount of the license fee payable for a

distributor's license under this act but no such license shall be deemed to expire prior to July first, one thousand nine hundred and thirty-five, notwithstanding the amount of the license fee paid. The board shall have power without hearing to issue, to the holders of such distributor's licenses, new licenses under the provisions of this act to expire on the date fixed by the board as the expiration date of licenses in the district in which granted, for which license a fee shall be paid equal to one-twelfth of the fee fixed by this act for each month such license is to be in force. In fixing the expiration dates of existing licenses granted to distributors by county treasurers and the dates when licenses issued by the board shall become effective, the board shall not divide any calendar month, but shall have full discretion to adjust the time for which credit shall be given for the license fee paid to the county treasurers, except as above excepted.

(c) Upon final enactment of this act, the board is authorized to issue importing distributors' licenses to those who qualify, without hearings, for such period of time as the board determines will expire between such date and the beginning of the license year for the district in which the licensed place is located, upon payment of a license fee at the schedule of rates herein set forth, said fee to be determined on a monthly basis.

PENNSYLVANIA LIQUOR CONTROL BOARD

REGULATION No. 51

July 25, 1935

Subject: Application for Distributors and Importing Distributors Licenses

Section 1. Except as hereinafter provided, every person holding a Malt Liquor Distributor's License issued by the respective County Treasurers of this Commonwealth shall, not later than August 10, 1935, file with the Pennsylvania Liquor Control Board an application for a Malt or Brewed Beverage Distributor's or Importing Distributor's License on forms furnished by the Board, together with a surety bond in the amount of One Thousand ($1000.00) Dollars in the case of a Distributor and in the case of an Importing Distributor in the amount of Two Thousand ($2,000.00) Dollars, an application fee of Ten ($10.00) Dollars and a license fee calculated from July 1, 1935 at the rate of Thirty-three and 33-100 ($33.33) dollars in the case of a Distributor and in the case of an Importing Distributor at the rate of Seventy-five ($75.00) dollars for each month the license will be in force in the particular license district fixed by the Board in which the Distributor's or Importing Distributor's place of business is located less a credit of the unused portion of the fee paid by the Distributor to the County Treasurer for such license calculated on a monthly basis from July 1, 1935.

In the event that the Distributor fails to file an application as hereinbefore set forth, then he may continue to operate as a Distributor defined in the Act of July 18, 1935, No. 398, known as the Beverage License Law, only for such a period under his present license as the unused portion of the fee

paid by such Distributor to the County Treasurer for such license will bear to the annual fee of Four Hundred ($400.00) Dollars, both calculated on a monthly basis.

Failure to file an application as above set forth may result in a Distributor being without a license between the expiration date of his present license and the license year as set up by the Board for the district in which his place of business is located.

EXCEPTION

Licenses of Distribu[illegible]o paid to the County Treasurer fees of $37.50 and $50.00 respectively will expire on August 1, 1935, at which time operations must be discontinued, unless an application for a Distributors' or an Importing Distributor's License is filed with the Board prior to that date, as the unused balance of such fees calculated as of July 1, 1935 is not sufficient on the basis of the new fees calculated at the rate of $33.33 per month to extend such license beyond said date.

Section 2. Persons holding both a Distributor's License and a Liquor Importer's License may under Act 398 of July 18, 1935 known as the Beverage License Law hold only one class of license. Such distributor if he prefers to retain his Liquor Importer's License will be given such time to dispose of his stock of malt or brewed beverages as the Board in each individual case may determine. Each such Distributor shall furnish to the Board, not later than August 1, 1935 a complete inventory of the stock on hand of malt or brewed beverages both domestic and imported, if any.

Pennsylvania Liquor Control Board.

WILSON ACT

of August 8, 1890, (tit. 27, Sec. 121, USCA), provides as follows:

> "Sec. 121. State statutes as operative on termination of transportation; original packages. All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise."

WEBB-KENYON ACT

of March 1, 1913, (tit. 27, Sec. 122, USCA), provides as follows:

> "Sec. 122. Shipments into states having dry laws; prohibtion. The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, * * * into any other State, Territory, or District of the United States, * * * which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or

in any manner used, either in the original package or otherwise, in violation of any laws of such State, Territory, or District of the United States, * * * is hereby prohibited."

AMENDMENT XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
Southern Division

Pacific Fruit & Produce Company, a corporation, Plaintiff, vs. Clarence D. Martin, Governor of the State of Washington, et al., Defendants,	Equity No. 569 *Memorandum Decision Upon Application for Interlocutory Injunction and Motions to Strike and Dismiss.*

Filed February 28, 1936.

Before HANEY, Circuit Judge, and CUSHMAN and BOWEN, District Judges.

CUSHMAN, District Judge:

The foregoing statement does not include trial amendments of the Bill of Complaint filed after the hearing, for the reason that, because of the conclusion reached, added statement is unnecessary.

The motion of the defendants to strike certain of the allegations of the Bill of Complaint will be denied.

The motion to dismiss, insofar as it is stated in paragraphs I and II of the Motion, will be denied without discussion.

The statutes of which particular complaint is made, Section 2 of Chapter 158 of the Session Laws of 1935 (Rem. Rev. Stat., Sec. 7306-23) and Section 3 of Chapter 174, of the Session Laws of 1935 (Rem. Rev. Stat. Sec. 7306-27), if con-

strued and applied as described in the Bill of Complaint, in conjunction, violate the commerce clause, Article I, Section 8, Clause 3 of the Constitution of the United States, unless the Twenty-first Amendment repealed the commerce clause, insofar as interstate commerce in intoxicating liquor is concerned. This it did not do. Young's Market Co. v. State Board of Equalization, 12 F. Supp. 140; Joseph Triner Corporation v. Arundel, 11 F. Supp. 145.

While it may be conceded that the intent of the Wilson Act, 26 Stat. 313 (Title 27, U. S. C. A., Sec. 121, Pocket Part), the Webb-Kenyon Act, 37 Stat. 699-49 Stat. 877 (Title 27, U. S. C. A., Sec. 122, Pocket Part), the Act of March 22nd, 1933, 48 Stat. 19, Sec. 6, referred to in Defendants' brief as the "Collier Act", repealed and in part re-enacted, 49 Stat. 877, Sec. 202 (a) and (b), and the Twenty-first Amendment, was to take from intoxicating liquor the protection of the interstate commerce laws insofar as necessary to deny them an advantage over the intoxicating liquors produced in the state into which they were brought, yet, none of them show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against the intoxicating liquor brought into one State from another.

It has been contended, upon behalf of defendants, that Section 2 of Chapter 158, supra, of which complaint is made, does not so discriminate. With this contention we are unable to agree. This enactment, in the case of intoxicating liquor made and purchased without the state, denies to the owner the right to use it as he could use it if made within the state. If made within the state, both the owner and the state could reach the manufacturer and compel observance of its law or obtain relief for its violation, but neither the owner nor the

State has such power over the outside manufacturer who in no way is within the state.

Defendants, in their brief, state:

> "Plaintiff is the exclusive sales agency of the Pabst Products in the state of Washington."

If such be the fact it is in no way made to appear, either by the Bill of Complaint or by any showing made upon the motions now considered.

It follows that Section 2 of Chapter 158, supra, is void, not only because it violates the commerce clause, Article I, Section 8, clause 3, but also the Fourteenth Amendment, in that its enforcement, as proposed, would take from the plaintiff its property without due process of law, and also in that it denies plaintiff the equal protection of the law. Young's Market Co v. State Board of Equalization, 12 F. Supp. 140.

If the decision of the District Court for the Eastern District of Pennsylvania in Premier-Pabst Sales Corporation v. Grosscup, et al., 12 F. Supp. 970, is opposed to any of the conclusions which we have reached we feel constrained, both upon reason and the persuasiveness of the authorities herein cited, to so hold without qualification.

If interstate commerce is to be taxed, in addition to that necessary to defray the expense of inspection, the power to do so is that of the Federal government and not that of the State.

The orderly and secure regulation of the manufacture and sale of property in each of the states by such states and of the regulation and fostering of commerce between them require that neither trammel nor encroach upon that authority which belongs to the other. The authority of neither is to be extended by construction of constitution or statute beyond what is clearly implied from the recognized authority of each. This enactment attempts to reach beyond the State's actual author-

ity and take something from that of the nation, a sister state and the individual.

The determination reached obviates the necessity of any discussion concerning the validity of the statute under the State constitution. It also obviates the necessity of considering the validity of Section 3 of Chapter 174, supra, disassociated from Section 2 of Chapter 158, supra.

An Interlocutory Injunction will issue.

The Motion to Dismiss will be denied.

Any order based upon the foregoing rulings will be tentatively settled before the local judge upon notice.

The Clerk is directed to notify the attorneys for the parties of the filing of this decision.

BERT E. HANEY, *Circuit Judge.*
EDWARD E. CUSHMAN, *District Judge.*
JOHN C. BOWEN, *District Judge.*